

No. 281.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

**PACIFIC COAST STEAMSHIP
COMPANY, a corporation,**
Appellant,

vs.

**EBEN W. FERGUSON, ELIDA F.
HOBSON, and JOHN COOK,
co-partners, and doing business
under the firm-name and style
of Moore, Ferguson & Co.,**
Appellees.

FILED

FEB 3 - 1896

TRANSCRIPT OF RECORD.

Appeal from the District Court of the United
States for the Northern District of California.

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Citation on Appeal.

UNITED STATES OF AMERICA—SS.

THE PRESIDENT OF THE UNITED STATES, to Eben W. Ferguson, Elida F. Hobson, and John Cook, co-partners, and doing business under the firm name and style of Moore, Ferguson & Co., Greeting :

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 3rd day of February next, pursuant to an order allowing appeal entered in the Clerk's office of the District Court of the United States for the Northern District of California in that certain cause entitled Pacific Coast Steamship Co., a corporation, libelant, vs. Eben W. Ferguson, Elida F. Hobson, and John Cook, copartners, and doing business under the firm name and style of Moore, Ferguson & Co., respondents, and you are admonished to show cause, if any there be, why the judgment rendered against the said libelant as in the said order allowing appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable WM. W. MORROW, Judge of the United States District Court for the Northern District of California, this 24th day of January, A. D. 1896.

WM. W. MORROW,
Judge.

[Endorsed]: Filed Jan'y 24th, 1896. Southard Hoffman, Clerk.

Service of the within Citation is hereby admitted this 24th day of January, 1896.

MASTICK, BELCHER & MASTICK,

Attorneys for Respondents.

In the District Court of the United States, in and for the Northern District of California.

PACIFIC COAST STEAMSHIP COMPANY, a
Corporation,

Libelant,

vs.

EBEN W. FERGUSON, ELIDA F. HOBSON,
and JOHN COOK, Copartners, and doing
business under the firm name and style
of Moore, Ferguson & Co.,

Respondents.

Libel.

To the Honorable WM. W. MORROW, Judge of the District Court of the United States of America, for the northern district of California:

The libel of the Pacific Coast Steamship Company, owners of the steamer "Bonita," in a cause of contract, civil and maritime, respectfully shows and alleges:

I.

That libelant is, and during all the times herein refer-

red to was, a corporation organized and existing under and by virtue of the laws of the State of California, with its office at the city and county of San Francisco, said state.

II.

That respondents above named are, and during all the times herein referred to were merchants, and copartners doing business at the said city and county of San Francisco, under the firm name and style of Moore, Ferguson & Co. and residing at said city and county.

III.

That at and during all the times herein referred to, libelant was the owner of, and was in control of, that certain steam vessel named "Bonita," and that heretofore, to wit, on the 2nd day of November, 1894, said Moore, Ferguson & Co., shipped on board of said steamer "Bonita," at Moss Landing, to be from said landing transported and delivered to the Howard Commercial Co., at the port of San Diego, all in the State of California, certain merchandise, to wit, 2,448 sacks of barley, marked "96," and weighing 271,510 pounds; and said Moore, Ferguson & Co. then and there agreed, in consideration, that the same was so shipped and should be so transported and delivered; to pay to libelant the sum of \$4.35 per ton of 2,000 pounds for each and every such ton of the same so shipped and so transported and delivered. That at the time aforesaid, to wit, the time said Moore, Ferguson & Co. so shipped such barley, it was agreed by and between said Moore, Ferguson & Co. and libelant, at the special instance and request of said

Moore, Ferguson & Co., that such barley should be delivered to the Howard Commercial Co. at said San Diego, upon the payment by said Howard Commercial Co. to libelant, upon such delivery, of the sum of \$2.50 per ton of 2,000 pounds for each and every such ton that should be so delivered, which sum of \$2.50 per ton so to be paid should be credited as a payment, on account, toward the payment of said sum of \$4.35 per ton agreed to be paid by said Moore, Ferguson & Co., as above stated, the balance of such sum of \$4.35 per ton, to wit, the sum of \$2.10 per ton of 2,000 pounds said Moore, Ferguson & Co. promised and agreed, such delivery of said barley being first made, to pay on demand to libelant.

IV.

That thereupon, and thereafter, said barley, and all thereof, was transported on said steamer, and on, to wit: the 6th day of March, 1884, was delivered in good order and condition, to said Howard Commercial Co., at said San Diego, in full compliance with the agreement above stated, and there was paid to libelant upon such delivery by said Howard Commercial Co., and the same was accepted by libelant pursuant to the agreement with said Moore, Ferguson & Co., the sum of, to wit: \$339.38, being the sum of \$2.50 per ton, for each and every ton of 2000 pounds of such barley so shipped and so delivered.

V.

That thereafter, and heretofore, to wit: on the day of November, 1894, the said Moore, Ferguson & Co., were fully informed by libelant of the facts aforesaid, to wit:

of such delivery and payment, as aforesaid, and the demand was thereupon made upon said Moore, Ferguson & Co., by libelant; that said Moore, Ferguson & Co., pay to libelant the balance of said sum of \$4.35 per ton, agreed to be paid to libelant by said Moore, Ferguson & Co., as aforesaid, to wit: the full sum of \$251.15, which sum and every part thereof, said Moore, Ferguson & Co., then did, and ever since, though often requested so to do, have neglected, declined and refused to pay to libelant; and there is now due to libelant as freight upon such barley, so shipped, the sum of \$251.15, together with interest on said sum from the said 6th day of November, 1894.

VI.

That by reason of the premises, libelant has been damaged in the full sum of two hundred fifty-one and $\frac{15}{100}$ (\$251.15) dollars, and interest as aforesaid.

VII.

That all and singular the premises are true and within the admiralty, and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, the libelant prays that a citation in due form of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against the said Moore, Ferguson & Co., and that they be cited to appear and answer upon oath, all and singular, the matters aforesaid, and that this Honorable Court will be pleased to decree payment of the freight aforesaid, with interest and costs, and that libelant may have such other and further relief in the

premises as in law and justice they may be entitled to receive.

PACIFIC COAST STEAMSHIP COMPANY.

(By CHAS. GOODALL, President.)

GEO. W. TOWLE, Jr.,

Proctor for Libelant.

STATE OF CALIFORNIA, } ss.
 City and County of San Francisco. }

Charles Goodall, being first duly sworn, deposes and says: That he is the President of the Pacific Coast Steamship Company, a corporation, libelant, in the above-entitled proceeding, and that as such President, he is authorized to make, and does make, the above and foregoing libel, and verify the same for and on behalf of said company, libelant; that he has read the foregoing libel, and knows the contents thereof, and that the same is true of his own knowledge, excepting as to matters therein alleged upon information or belief, and as to such matters that he believes the same to be true.

CHAS. GOODALL.

Subscribed and sworn to before me this 22nd day of May, 1895.

[SEAL]

JAMES L. KING,

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 23rd, 1895. Southard Hoffman, Clerk.

Citation to Appear in District Court.

NORTHERN DISTRICT OF CALIFORNIA—SS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, To
the Marshal of the United States for the Northern
District of California, Greeting:

Whereas, a libel has been filed in the District Court of the United States for the Northern District of California on the 23d day of May in the year of our Lord one thousand eight hundred and ninety-five, by Pacific Coast Steamship Company, a corporation, against Eben W. Ferguson, Elida F. Hobson and John Cook, copartners, and doing business under the firm name and style of Moore, Ferguson & Co., in a certain action of contract, civil and maritime, to recover the sum of \$251.15 (as by said libel, reference being made thereto, will more fully and at large appear), together with interest on said sum from the 6th day of November, 1894, therein alleged to be due the said libelant, and praying that a citation may issue against the said respondents, pursuant to the rules and practice of this court. Now, therefore, we do hereby empower and strictly charge and command you, the said Marshal, that you cite and admonish the said respondents if they shall be found in your district, that they be and appear before the said District Court, on Tuesday, the 4th day of June, A. D. 1895, at the courtroom in the city of San Francisco, then and there to answer the said libel, and to make their allegations in that behalf, and have you then and there this writ, with your return thereon.

Witness, the Honorable WILLIAM W. MORROW, Judge of said court, the 23d day of May in the year of our Lord one thousand eight hundred and ninety-five, and of our Independence the one hundred and nineteenth.

[SEAL.]

SOUTHARD HOFFMAN,
Clerk.

GEO. W. TOWLE, Jr. Esq.,

Deputy Clerk.

Marshal's Return.

I have served this writ personally by copy on Eben W. Ferguson, Elida Hobson and John Cook, doing business under the firm name and style of Moore, Ferguson & Co., this 23d day of May, A. D. 1895.

BARRY BALDWIN,
U. S. Marshal.

By J. A. Littlefield,
Deputy Marshal.

[Endorsed]: Citation issued May 23d, 1895. Citation ret'ble June 4th, 1895. Geo. W. Towle, Jr., Proctor for Libelant. Filed June 4th, 1895. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

Order of Proclamation, Etc.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom, in the city of San Francisco, on Tuesday, the 4th day of June, in

the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable WM. W. MORROW,
Judge.

PACIFIC COAST STEAMSHIP COMPANY,)

vs.

E. W. FERGUSON, ET AL.

) No. 11,167.

The United States Marshal having returned upon the citation in this cause that he has served the citation on respondents herein, on motion of Geo. W. Towle, Jr., Esq., proctor for the libelant, proclamation was duly made, and on motion of W. C. Belcher, Esq., proctor for the respondents, it is ordered that the respondents have ten days to answer.

Respondent's Stipulation for Costs.

No. 11,167.

UNITED STATES OF AMERICA.

District Court of the United States, for the Northern District of California.

Whereas, a libel was filed in this court on the 23rd day of May in the year of our Lord one thousand eight hundred and ninety-five by Pacific Coast S. S. Co., against E. W. Ferguson et al., for reasons and causes in the said libel mentioned and the said E. W. Ferguson et al., and

A. O. Mulligan his sureties, hereby consenting and agreeing that in case of default or contumacy on the part of the said Respdts., or his sureties, execution may issue against their goods, chattels, and lands for the sum of five hundred dollars.

Now, therefore, it is hereby stipulated and agreed for the benefit of whom it may concern, that the undersigned shall be, and each of them is, bound in the sum of five hundred dollars conditioned the Respondents, above-named shall pay all costs and charges that may be awarded against them in any decree by this court, or, in case of appeal by the Appellate Court.

MOORE, FERGUSON & Co.,

per E. M. FERGUSON.

A. O. MULLIGAN.

Taken and acknowledged this 4th day of June, 1895, before me.

J. S. MANLEY,

Commissioner United States Circuit Court, Northern
District of California.

NORTHERN DISTRICT OF CALIFORNIA—SS.

A. O. Mulligan, parties to the above stipulation being duly sworn, do depose and say, each for himself that he is worth the sum of five hundred dollars, over and above all his debts and liabilities.

A. O. MULLIGAN.

Sworn to this 4th day of June, 1895, before me,

J. S. MANLEY,

Commissioner United States Circuit Court, Northern
District of California.

[Endorsed]: Filed the 4th day of June, 1895. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, for the Northern District of California.

PACIFIC COAST STEAMSHIP COMPANY,
a Corporation,

Libelant,

vs.

EBEN W. FERGUSON, ELIDA F. HOBSON
and JOHN COOK, Copartners, and doing
business under the firm name and
style of Moore, Ferguson & Co.,
Respondents.

No. 11,167.
In Admiralty.

Answer.

To the HON. WILLIAM W. MORROW, Judge of the District Court of the United States of America for the Northern District of California:

Eben W. Ferguson, Elida F. Hobson and John Cook, copartners, and doing business under the firm name and style of Moore, Ferguson & Co., of San Francisco, in the Northern District of California, for answer to the libel of the Pacific Coast Steamship Company, a corporation, in a cause of contract, civil and maritime, do allege and propound as follows:

1. They admit the allegations of the first article of said libel.

2. They admit the allegations of the second article of said libel.

3. They admit that, at and during all the times referred to in said libel, libelant was the owner of and was in control of that certain steam vessel named "Bonita" and that, on the second day of November, 1894 these respondents shipped on board the said steamer "Bonita" at Moss landing, to be from said landing transported and delivered to the Howard Commercial Co., at the port of San Diego, all in the State of California, certain merchandise, to wit: 2448 sacks of barley, marked "96," and weighing 271,510 pounds.

These respondents deny that, at the time and place mentioned in the third article of said libel, or at any time or place, or ever, or at all, these respondents, or any of them, agreed, either in consideration that the said merchandise should be so shipped, transported and delivered, or otherwise, or at all, to pay to libelant the sum of \$4.35 per ton of 2,000 pounds for each or any such ton of the same to be shipped, or transported, or delivered, or any sum exceeding \$3.35 per ton of 2,000 pounds.

And in that behalf these respondents allege and pro-pound that the agreement between libelant and respondents concerning the shipping and transportation of said merchandise was as follows, and not otherwise: Libelant agreed that it would transport from said Moss Landing to said San Diego, and would there deliver to the said Howard Commercial Co., the merchandise aforesaid, and, in consideration that the same was so shipped and should be so transported and delivered, these respondents agreed to pay to libelant the sum of \$3.10 per ton

of 2,000 pounds, and no other or greater sum, as freight for the transportation of each and every such ton so transported and delivered, as aforesaid, and that they would also pay to said libelant such storage charges on said merchandise as had theretofore accrued at the warehouse of libelant, at Moss Landing aforesaid, which warehouse charges, as these respondents are informed and believe to be true, were the sum of twenty-five cents per ton of 2,000 pounds, and no other or greater sum.

These respondents admit that at the time aforesaid it was agreed by and between respondents and libelant, at the special instance and request of respondents, that said merchandise should be delivered to said Howard Commercial Co. at said San Diego upon the payment by said Howard Commercial Co. to libelant, upon such delivery, of the sum of \$2.50 per ton of 2,000 pounds for each and every such ton that should be so delivered, which sum of \$2.50 per ton so to be paid should be credited as a payment on account toward the payment of the sum agreed to be paid by respondents as herein in this answer alleged; but they deny that they agreed to pay for the same the sum of \$4.35 per ton, or any greater sum than \$3.35 per ton, as herein above alleged, or that they ever promised or agreed to pay to libelant, as a balance over and above said sum of \$2.50 per ton, the sum of \$2.10 per ton of 2,000 pounds, or any sum or amount exceeding eighty-five cents per ton of 2,000 pounds.

Further answering, these respondents deny each and every allegation contained in the third article of said libel not hereinbefore specifically admitted.

4. They admit the allegations contained in the fourth article of said libel.

5. They admit that on the 16th day of November, 1894, they were informed by libelant of the delivery of said merchandise, and of the payment made by the said Howard Commercial Co., as alleged in the fourth article of said libel, and that libelant thereupon demanded of respondents that respondents pay to libelant the sum of \$251.15 as a balance upon said contract over and above the said sum of \$2.50 per ton so paid by said Howard Commercial Co., and that respondents then and there refused and ever since have neglected, declined and refused to pay to libelant the said sum of \$251.15, or any greater sum or amount than \$115.39; but they deny that there is due or ever was due to libelant, as freight upon said merchandise, the sum of \$251.15, with or without interest, or any greater sum or amount than \$81.45, or that there is or ever was due to libelant from respondents, under the contract aforesaid, any greater sum or amount than \$115.39.

6. They deny that, by reason of the premises, or of any matter or thing in said libel alleged or propounded, libelant has been damaged in the sum of \$251.15, with or without interest, or in any sum or amount, or at all.

7. Further answering, these respondents propound and allege, that on the 16th day of November, 1894, and upon demand being made upon them by libelant, as aforesaid, these respondents offered to pay, and tendered to libelant in full payment and satisfaction of the demand aforesaid, the sum of \$115.39, being the whole amount due from them to libelant, as aforesaid, and have ever

since that time been ready, able and willing to pay to libelant the said sum of \$115.39 ; but libelant then and there refused, and ever since has neglected and refused to receive or accept the said sum of \$115.39, or any part thereof ; and these respondents now bring the said sum of \$115.39 into court, and do now deposit the same in the registry of this Honorable Court for libelant, in full satisfaction of the obligation aforesaid.

8. That all and singular the premises are true.

Wherefore, these respondents pray that the said libel may be dismissed with costs.

MASTICK, BELCHER & MASTICK,
Proctors for Respondents.

UNITED STATES OF AMERICA, }
Northern District of California. } ss.

Eben W. Ferguson, being first duly sworn, deposes and says, that he is one of the respondents in the above-entitled cause ; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and that, as to such matters, he believes it to be true.

EBEN W. FERGUSON.

Subscribed and sworn to before me, this 4th day of June, 1895.

JOHN FOUGA,
Commissioner U. S. Circuit Court, Northern District of California.

[Endorsed]: Filed June 4th, 1895. Southard Hoffman, Clerk.

*District Court of the United States, Northern District of
California.*

PACIFIC COAST S. S. Co.,)
 vs.) No. 11,167.
 E. W. FERGUSON ET AL.)

Clerk's Costs and U. S. Marshal's Costs.

1895.		
June.	To amt. tender	\$115 39
	Clerk's and Commissioner's costs	17 80
	U. S. Marshal's costs	2 00
		<hr/>
		\$135 19

Rec'd above amt's,

JOHN FOUGA, for Clerk.

June 4, 1895.

[Endorsed]: Filed June 4, 1895. Southard Hoff-
man, Clerk.

At a stated term of the District Court of the United
States of America, for the Northern District of
California, held at the courtroom, in the city of
San Francisco, on Thursday, the 29th day of
August, in the year of our Lord one thousand eight
hundred and ninety-five.

Present: The Honorable WM. W. MORROW, Judge.

PACIFIC COAST STEAMSHIP COMPANY,)
 vs.) No. 11,167.
 EBEN W. FERGUSON, ET AL.)

Hearing,

This cause this day came on regularly for hearing, Geo. W. Towle, Jr., Esq., appearing as proctor for the libellant, and W. B. Treadwell, Esq., as proctor for the respondents. Mr. Towle stated the case on behalf of the libellant and called J. H. Cooper, H. W. Goodall, and Edwin Goodall, who were duly sworn and examined as witnesses on behalf of the libellant and rested.

Mr. Treadwell stated the case on behalf of the respondents and called Eben W. Ferguson, who was duly sworn and examined as a witness on behalf of the respondents, and pending the examination of Mr. Ferguson the further hearing hereof was continued until Friday, August 30th, 1895.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom, in the City of San Francisco, on Friday, the 30th day of August, in the year of our Lord, one thousand eight hundred and ninety-five.

Present: The Honorable WM. W. MORROW, Judge.

PACIFIC COAST STEAMSHIP COMPANY,

vs.

EBEN W. FERGUSON, ET AL.

} No. 11,167.

Hearing—(Continued.)

This cause this day came on for further hearing, Geo. W. Towle, Jr., Esq., appearing as proctor for the libellant,

and W. B. Treadwell, Esq., as proctor for the respondents. The examination of Eben W. Ferguson, a witness on behalf of the respondents was resumed and concluded, and Mr. Treadwell called L. H. Garrigus and John Cook who were duly sworn and examined as a witness on behalf of the respondents and rested.

Mr. Towle recalled J. H. Cooper, who was further examined as a witness on behalf of the libelant in rebuttal, and rested.

And, thereupon, the hearing hereof was continued until September 5th, 1895, for argument.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom, in the city of San Francisco, on Tuesday, the 10th day of September, in the year of our Lord, one thousand eight hundred and ninety-five.

Present: The Honorable WM. W. MORROW, Judge.

PACIFIC COAST STEAMSHIP COMPANY,

vs.

E. W. FERGUSON, ET AL.,

} No. 11,167.

Hearing—(Continued.)

This cause, this day, came on regularly for argument and was duly argued by Geo. W. Towle, Jr., Esq., proctor for libelant, and by W. B. Treadwell, Esq., proctor for respondents, and submitted to the Court for consideration and decision.

*In the District Court of the United States, in and for the
Northern District of California.*

HON. W. W. MORROW, Judge.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation),	} Libelant,	
vs.		
EBEN W. FERGUSON ET AL.,		} Defendants.

Testimony.

THURSDAY, AUGUST 29, 1895.

APPEARANCES: GEORGE W. TOWLE, Esq., appeared as proctor for the libelant; W. B. TREADWELL, Esq., appeared as proctor for the respondents.

This libel now came on for hearing in its regular order upon the calendar, and the following proceedings were had:

Mr. Towle. May it please the Court: This is an action by the Pacific Coast Steamship Company against Eben W. Ferguson, et al., a partnership doing business in this city and county, to recover a balance of a sum alleged to be due for freight on certain barley transported from Moss Landing to San Diego in November last—the agreement being at the time the barley was transported that a portion only of the amount of freight due on it should be collected on delivery at San Diego by the Howard Commercial Company, that being the special instance and request of the shippers, who were Moore,

Ferguson & Co., they agreeing at that time that the balance due should be paid by them here on demand after delivery.

The barley was delivered and shipped pursuant to that understanding, delivered in good order at San Diego, and the \$2.50 collected there from the Howard Commercial Company, whereupon demand was made upon Moore, Ferguson & Co., here for the balance of the sum due on the shipment, and on their demand being made, payment was refused: hence this suit.

The main subject of controversy in the case arises out of a difference of opinion between the gentlemen on the two sides. On our side, it is alleged, that at the very time this agreement was made, it was expressly called to the attention of Moore, Ferguson & Co., that there might be railroad charges on this lot of barley which would be required to be paid, also—back charges on the barley, when it came into the warehouse of the Pacific Coast Steamship Company at Moss Landing.

The Court. Where was the barley shipped from?

Mr. Towle. From Moss Landing, down the coast.

The Court. Originally shipped from some place in the interior to Moss Landing?

Mr. Towle. It had been shipped by rail. At the time this conversation with reference to this shipment took place, the Pacific Coast Steamship Company, was not informed as to what the particular lot of barley was, or what its condition was as it lay in the warehouse, with reference to railroad charges being a lien on it. In that state of the case they were unable to state definitely what those charges might be, if there were such,

but that matter was expressly called to the attention of the representatives of Moore, Ferguson & Co. They were expressly informed there might be such charges on this barley as the result of railroad transportation from some point to the warehouse at Moss Landing. They were asked then whether, in view of that contingency, they would wish this freight to go forward to be delivered to Moore, Ferguson & Co.—they assumed the responsibility for these back charges. They expressly said that they did. In response to their request, the grain was shipped. The agents at San Diego were instructed to deliver on the receipt of \$2.50, and the subsequent proceedings took place. The fact was, that there were back charges of \$1 per ton—railroad charges on this grain. It is over that question of that \$1 per ton, whether Moore, Ferguson & Co. agreed to pay it, that the controversy turns.

The Steamship Company, on delivery, collected the \$2.50 and applied that towards the payment of the back charges so far as it was necessary to be applied in that way, and sue here for the balance of freight due.

The allegation as to the incorporation of the plaintiff is admitted. It is admitted that the respondents were a copartnership, as alleged. It is admitted that at the time of this transaction the Pacific Coast Steamship Company was the owner of the steamer "Bonita," on which the grain was shipped, and was then operating her; that the grain was shipped on board of the "Bonita" at Moss Landing, to be from said landing transported and delivered to the Howard Commercial Company in the port of San Diego, all in the State of

California, to wit: "2,448 sacks of barley, marked '96,' and weighing 271,510 pounds." That is admitted.

This further allegation of paragraph 3 is not admitted at least not in the denial as to this specific particular; that is, "that said Moore, Ferguson & Co. then and " there agreed, in consideration that the same was so " shipped and should be so transported and delivered, to " pay to libelant the sum of \$4.35 per ton of 2,000 " pounds, for each and every such ton of the same so " shipped and so transported and delivered. That at the " time aforesaid, to-wit: the time said Moore, Ferguson " & Co. so shipped such barley, it was agreed by and " between said Moore, Ferguson & Co. and libelant, at " the special instance and request of said Moore, Fergu- " son & Co. that such barley should be delivered to the " Howard Commercial Company at said San Diego, " upon the payment by said Howard Commercial Com- " pany to libelant, upon such delivery, of the sum of " \$2.50 per ton of 2,000 pounds, for each and every " such ton that should be so delivered, which sum, of " \$2.50 per ton so to be paid, should be credited as a " payment on account, toward the payment of said sum " of \$4.35 per ton agreed to be paid by said Moore, Fer- " guson & Co., as above stated, the balance of such sum " of \$4.35 per ton, to-wit: the sum of \$2.10 per ton of " 2,000 pounds, said Moore, Ferguson & Co. promised " and agreed, such delivery of such barley being first " made, to pay, on demand, to libelant."

The next paragraph, 4, which I shall read is expressly admitted in the answer:

"That thereupon, and thereafter, said barley, and all

“ thereof, was transported on said steamer, and on, to wit:
“ the 6th day of November, 1894, was delivered in good
“ order and condition to said Howard Commercial Co.
“ at said San Diego, in full compliance with the agree-
“ ment above stated, and there was paid to libelant upon
“ such delivery by said Howard Commercial Co., and
“ the same was accepted by libelant pursuant to the
“ agreement with said Moore, Ferguson & Co., the sum of
“ to wit: \$339.38, being the sum of \$2.50 per ton of
“ 2,000 pounds of such barley so shipped and so deliv-
“ ered.”

That allegation is expressly admitted in the answer, and, it seems to me, carries the whole proposition with it, because it is an express admission that the barley was delivered pursuant to the contract and agreement set out in the preceding paragraph, paragraph 3, and, in my view, leaves nothing further to be said upon the subject.

The next paragraph, as to the demand and refusal, is also admitted, except that there is denial that there is now due the libelant, freight on the barley so shipped, the sum of \$251.15, together with interest on said sum.

It is denied that any damage has resulted. It is admitted, by a failure to deny, that all and singular the premises are true.

Mr. Treadwell. If the Court please, with regard to the question of pleadings suggested, I understand it to be a rule that the allegation of the pleadings once explicitly denied need not be denied over again. The contract referred to is expressly in terms denied, and the other contract, as alleged by us, is set up. The mere re-

ference in other parts of the complaint to the contract, does not require any answer.

The facts of this case, as we shall expect to prove them, are these:

The Pacific Coast Steamship Company is a common carrier by sea only, but it has also a warehouse at Moss Landing at Monterey bay, in which it receives goods as a warehouseman. At Moss Landing there is a railroad which comes in from the interior, and which is not owned or controlled in any manner by the Pacific Coast Steamship Company, but by an entirely independent railroad. The Howard Commercial Company is a firm doing business in San Diego. Moore, Ferguson & Co., the respondents in this case, are commission merchants buying and selling grain and produce on commission. They received about this time, an order from the Howard Commercial Company, to purchase for them a certain amount of barley within a fixed price—that is, within a given limit. Moore, Ferguson & Co., were unable to find any barley in San Francisco which would bear that price, which they would purchase within that limit. They finally were informed by Waterman & Co., of this city that they had at Moss Landing a quantity of barley which they would sell for a certain price, and which Moore, Ferguson & Co. thought, if proper freight charges could be arranged, would bring it within that limit. Whereupon Moore, Ferguson & Co. applied to the libellant in this case to name a freight rate from Moss Landing to San Diego. At that time the Howard Commercial Company had a special contract with the Pacific

Coast Steamship Company, making its rate from San Francisco to San Diego \$2.50 a ton on grain.

In response to this inquiry, the Pacific Coast Steamship Company said that they would ship the barley for Moss Landing to San Diego at \$3.10. At the time that that conversation was had, or at a conversation occurring immediately after, Mr. Cooper, the chief freight clerk of the Pacific Coast Steamship Company, informed the respondents in this case that there might be back charges on that grain, which would have to be paid if the grain was shipped; to which Moore, Ferguson & Co. responded that they would ascertain about that; that they had not yet seen the warehouse receipt. Subsequently, Moore, Ferguson & Co. saw the warehouse receipt in the hands of Waterman & Co., and that warehouse receipt, which is an ordinary negotiable warehouse receipt, contains these terms: that the grain is held there subject to storage charges which are mentioned, and also for shipment to San Francisco at a given rate, the storage charges at the warehouse being separately stated, and the rate of freight to San Francisco being separately stated. The warehouse receipt also contained an express agreement that the owners of the grain may, if they desire, withdraw it from the warehouse at Moss Landing on paying the warehouse charges. On this receipt were endorsed warehouse charges 25 cents a ton. Thereupon, Moore, Ferguson & Co. communicated with the Pacific Coast Steamship Company, through Mr. Cooper, and informed him they had seen the warehouse receipt, and there were charges on it of 25 cents per ton, which they would pay, and gave to Mr. Cooper a memorandum to that effect. They

made no objection, and mentioned no railroad charges, nor were such known to the parties, nor was it endorsed on the warehouse receipt.

On that state of things, Moore, Ferguson & Co. purchased the grain from Waterman & Co., deducting 25 cents storage, and had the grain shipped by the Pacific Coast Steamship Company. Not until some time after that was shipped was anything said about railroad charges.

Your Honor will see the only question at issue is, was there anything said to Moore, Ferguson & Co. at the time of this transaction about railroad charges, or anything from which they might take notice that there were railroad charges.

On that question the evidence perhaps will be conflicting. I should further state that the full amount of the freight under this contract, including the 25 cents for storage, was tendered by the respondents before the commencement of this suit, and immediately to the Pacific Coast Steamship Company, and by them refused. That allegation is made in the answer. The money is paid into court.

Mr. Towle. I understand, so far as the evidence in the case is concerned, all you propose to controvert is the conversation which took place between the representatives of Moore, Ferguson & Co., and the representatives of the Pacific Coast Steamship Company, with reference to railroad charges on this, which Moore, Ferguson & Co. agreed to assume.

Mr. Treadwell. I understand that is the difference between us as to the facts.

G. H. Cooper, called for the libelant, sworn.

Mr. Towle. Q. Are you in the employ of the Pacific Coast Steamship Company? A. I am.

Q. Were you in their employ at the time of the transaction involved in this suit? A. Yes, sir.

Q. What had you, if anything, to do with the matter in controversy; were you the representative of the Pacific Coast Steamship Company in that matter?

A. Yes, sir, I was.

Q. Will you kindly state to the Court the entire occurrence that took place between you and the representative of Moore, Ferguson & Co., with reference to the shipment of this lot of barley to the Howard Commercial Company, and the collection of the \$2.50 per ton from them on its delivery, and how the balance of the amount was to be collected?

A. Mr. Ferguson telephoned to me for our rate on about 100 tons of barley from Moss Landing to San Diego to the Howard Commercial Company. I told him our local rate from the landing to San Diego was \$3.10 per ton of 2000 pounds. He asked me if we could not make the same rate on that particular shipment of barley as applied to Mr. Howard's shipments from San Francisco of \$2.50 per ton. I told him we could not; furthermore, that the rate of \$3.10 per ton applied only from Moss Landing to San Diego, though no grain originated at Moss Landing; that there would probably be charges on the grain from some point on the narrow gauge railroad to Moss Landing. He then stated that he might wish to have the grain delivered to Mr. Howard at the same rate applied on the shipment from San Francisco, \$2.50, and asked if

that could be arranged in case we found it necessary. I told him I thought it could. He said: "I will see you about it later." Mr. Cook came down on November 3rd, I think in the morning, about that matter, and asked if we could arrange it. I told him I thought we could. I again spoke to him about the possibility of back charges on it. I told him that the shipment had gone forward, and that we had no record of it, it being billed on board the steamer, and suggested it might be better to let it go forward, the full amount to be collected, and they settle with Mr. Howard subsequently, between themselves. He said he thought perhaps that would be the better plan, and he would let me know later on. He came down again the same afternoon, and stated that he had found that his company had charged Mr. Howard up with \$2.50 per ton only, and that is all they could charge Mr. Howard, no matter what the back charges might be on the shipment, therefore he would like us to send a telegram. I again spoke to him about the possibility of back charges. Mr. Goodall was present at the conversation. Everybody else had left. It was on Saturday afternoon, and they close at 4 o'clock, and it was some time after 4 o'clock. I told him we had no record of the shipment. I did not know the number of sacks, and if he could advise me Monday morning about that we would telegraph. He came down, I think the following Tuesday morning, and said he would like to have us telegraph. I again went over with him the question of the probability of back charges from some point on the railroad to Moss Landing, and asked him, in view of that probability, did he wish us to telegraph to our agent to have

the grain delivered at \$2.50 per ton, collecting the balance from his company here. He expressed his wish in the affirmative. A telegram was written by me, submitted to Mr. Cook, Moore, Ferguson & Co's representative, and sent. The grain was delivered at \$2.50, the bill rendered by us to Moore, Ferguson & Co. at \$4.35; \$3.10 per ton our freight, \$1.00 back charges, and 25 cents storage. Moore, Ferguson & Co. refused to pay the charges from the original point of shipment to Moss Landing—railroad charges.

The Court. Q. Where were you located at the time these negotiations took place?

A. On Market street, in the office.

Q. You said you telephoned; where where was the telephone message from?

A. From Moore, Ferguson & Co.'s office.

Q. In this city? A. Yes, sir.

Q. With whom did you say you communicated by telephone? A. I talked with Mr. Ferguson.

Q. Your personal interview was with Mr. Cook?

A. Yes, sir.

Mr. Towle. Q. You have spoken of a telegram which was sent. Will you look at this and see whether that is a copy of the telegram? (Handing.)

A. That is a true copy of the telegram.

Mr. Towle. The telegram reads:

“Nov. 6th, 1894.

“To S. T. JOHNSON, San Diego, Calif.

“At request Moore, Ferguson collect only two dollars
“fifty per ton on Howard's twenty-four forty-eight bar-
“ley from Moss Ldg. ex Bonita, turning in relief voucher

“ for storage and balance freight rate to be collected from
“ them.

“ GOODALL, PERKINS & CO.”

(*Marked Libellant's Exhibit "1."*)

Q. Since that time, has any settlement been had with the railroad company with reference to these railroad charges on that lot?

Mr. Treadwell. Objected to as immaterial.

The Court. I overrule the objection.

Mr. Treadwell. We will take an exception.

A. A settlement has been made.

Mr. Towle. Q. What amount was paid to them on that settlement, if any?

Mr. Treadwell. The same objection.

The Court. Objection overruled.

Mr. Treadwell. Exception.

A. At the rate of \$1.00 per ton.

Mr. Towle. Q. When was that settlement made?

A. It was made in the adjustment of through traffic for November, 1894.

Q. Do you remember the amount that was paid?

A. I think \$135.76.

Q. During the time that this negotiation was going on between yourself and the representative of Moore, Ferguson & Co., did you have occasion to consult with reference to it with any one else in the office of Goodall, Perkins & Co.?

A. I spoke to Mr. Goodall about it prior to sending the telegram.

Q. Which Mr. Goodall?

A. Mr. Edwin Goodall, now present.

Q. That is while the matter of sending this telegram was under consideration? A. Yes, sir.

Q. And while the representative of Moore, Ferguson & Co. was there?

A. Yes, sir, he was there.

Q. Did he know that you were going to consult Mr. Goodall? A. I did not, I think.

Q. What was the occasion of your consulting him?

A. I felt assured that there would be a charge of the railroad company to Moss Landing, knowing that no grain originated at Moss Landing, and very little hauled there. I spoke to Mr. Goodall, saying that I was somewhat afraid there would be some controversy about that charge. He said, "I guess not; I know Moore, Ferguson & Co. quite well; I guess we are perfectly safe in sending the telegram; make it read, however, that it was sent at their request," which was done.

Mr. Treadwell. We move to strike out so much of the answer of the witness as relates to the conversation with Mr. Goodall, on the ground that it is not responsive to the question. We could not object to the question, but it did not call for that conversation. The conversation was not in the presence of Moore, Ferguson & Co., and is not competent against them.

The Court. That will have to go out.

Cross-Examination.

Mr. Treadwell. Can you state, Mr. Cooper, what were the precise words that you used in speaking with Mr.

Ferguson over the telephone with regard to back charges on this grain?

A. I stated that no grain originated at Moss Landing, and I thought there would be charges from some point on the narrow-gauge railroad to Moss Landing. I cannot state the precise words, but that is the substance of it.

Q. Are you quite sure that you mentioned the railroad in way in that conversation? A. I am.

Q. At that time, or at any time prior to the final shipment of this grain, was there any charges on the books of the Pacific Coast Steamship Company of any railroad freight on this grain?

A. There was not in our office.

Q. Was there any in the office of the Pacific Coast Steamship Company to your knowledge?

A. There must have been a knowledge of such charge by our warehouse man at Moss Landing.

Q. Excuse me, that is not the question. Was there on the books of the Pacific Coast Steamship Company at any time prior to the final conclusion of this transaction, any charge entered of railroad freight on this grain?

A. I know of no such charge.

Q. Had there, prior to that time, ever been on any lot of grain stored at Moss Landing, any charge on your books of railroad freight?

A. Not on our books in the office, to my knowledge.

Q. Do you know whether or not there ever had been any such charge on the books of the railroad company? A. I cannot say.

Q. You never knew of any, did you?

A. I know nothing about their accounts.

Q. The railroad company is an entirely independent concern, is it not?

A. It is independent except that we have a traffic arrangement with them.

Q. That is, you had contract relations with them?

A. Yes, sir.

Q. Did you inform Mr. Ferguson, or any representative of Moore, Ferguson & Co., what your contract arrangements with that railroad were?

A. I did not.

Q. You stated that you had a settlement subsequently with the railroad company. Was that settlement in writing? A. It was.

Q. Have you that paper?

A. It is there (pointing).

Q. Will you kindly produce it, or if counsel has it, will he produce it? Is that the paper to which you refer (handing)? A. It is.

Q. When was that statement rendered to your company?

A. It was rendered monthly. Sometimes there is some delay in rendering it. The date will show on it. It is a regular monthly statement. There is a letter from our agents inclosing it, I think you will find.

Q. Will you kindly examine the paper and see if you can inform us when it was rendered?

A. The statement was forwarded to us on February 11, 1895, enclosed in a letter from our agent at Moss Landing.

Q. February 11, 1895? A. Yes, sir.

Q. Some months prior to the receipt of this statement, then, you had demanded this sum of \$1.00 per ton from Moore, Ferguson & Co., had you not?

A. Yes, sir, we had.

Q. You demanded that as early as November, 1894, did you not? Yes, sir, November, 1894.

Q. At the time that you made that demand, had there yet been any entry on your books, or so far as you know on the books of the Railroad Company, of any such charge? A. There had not.

Q. How then, did you ascertain, at the time of that demand, that there was such a charge?

A. Because the shipment was billed from Blanco on the manifest of the steamer carrying the freight from Blanco at \$4.10 per ton freight, 25 cents storage, our rate being \$3.10 per ton, and there was a charge of \$1.00 from Blanco to Moss Landing, that being the regular rate paid them on the south-bound grain shipments.

Q. That was your manifest, was it not?

A. The manifest of the steamer.

Q. Prepared by your agents?

A. Made by our purser from the original manifest of our agent at Moss Landing.

Q. Do you know where he got the information on which he included \$1.00 per ton freight from Blanco?

A. We have a general contract with them to pay them \$1.00 per ton on grain from Blanco; south bound.

Q. When you had the various conversations with Mr. Cook, you stated that you told him there might be

back charges on this grain. Are you sure you used that language to Mr. Cook ?

A. There might be charges of the Railroad Company to Moss Landing.

Q. No ; that is not what you said. You said, if I took it down correctly, in three different conversations with Mr. Cook, there might be back charges on it. Is that correct, or not ?

A. I might have said back charges.

Q. Is that the language you used, or not ?

A. I think possibly I did say back charges. I also said railroad charges.

Q. To Mr. Cook ? A. Yes, sir.

Q. Can you explain, Mr. Cooper, why you did not think of that in testifying on your direct examination, as to what those conversations were ?

A. I think I did.

Q. You think you did ? A. I thought I did.

Q. Has there ever been any other occasion, Mr. Cooper, in which these back charges—railroad charges—have been charged to any shipper or to any person taking the train at Moss Landing ?

A. Kindly repeat the question.

Q. Has there ever been any other occasion in which you have charged a person shipping the grain from Moss Landing, or taking the grain from the warehouse at Moss Landing, any sum of railroad charges ?

A. Those charges are generally collected from the consignee; in fact, they are almost invariably.

Q. Have you ever made any charge against any person or firm of this kind before ?

A. We have always collected that charge on grain from the same point going south, that is, since the arrangement was first made. We have always collected at the rate of \$1 per ton from Blanco to Moss Landing on grain going south.

Q. That is what I asked. Have you ever on any occasion actually collected such a charge?

A. Yes, sir.

Q. Can you name one of those occasions?

A. I cannot name any specific occasion, except that it is done always when grain is forwarded from that point, or any point on that railroad going south.

Q. Could you, by examination of your books, refresh your memory, and find any instance in which you have ever made such a charge before?

A. I think there is no trouble about that.

Q. Kindly look them up between now and the next session of the court.

A. We can produce a manifest showing that bill.

Q. You understand the question? Can you, by an examination of your books, refresh your memory and find any instance in which you have ever made such a charge before, and let us know at the next session of the Court?

The Court. Do you know where Blanco is—where it is located? It is on the narrow gauge is it not?

A. Yes, sir.

Q. A shipping point on the narrow gauge in Salinas valley?

A. Yes, sir.

Redirect Examination.

Mr. Towle. Q. When you say that you know of no charges being made on the books of the Pacific Coast Steamship Company, you refer to charges which come under your observation in the local office in San Francisco, do you not? A. Yes, sir.

Q. As to what charges may have existed on the books of the warehouse at Moss Landing you are not informed? A. No, sir.

Q. So do not assume to testify with reference to their presence or absence? A. I do not.

Q. In the conduct of the business of the Pacific Coast Steamship Company at that warehouse, do they forward those matters to you except as they come incidentally in connection with grain shipments?

A. They do not.

Q. So that such charges might exist on the books there and you know nothing about them until occasion came to collect it as part of the freight transportation?

A. Yes, sir.

Q. That is so, is it? A. Yes, sir.

Q. This statement furnished here, to which your attention has been called, of settlement with the Railroad Company, is this an ordinary monthly statement?

A. It is.

Q. Furnished entirely by the Railroad Company?

A. Entirely.

Q. In the usual form. A. In the usual form.

Q. And in the usual course of business?

A. Yes, sir.

Q. Are you aware of this matter having been called to the Railroad Company's attention prior to the time that this statement was furnished?

A. No, sir; they were not informed in any manner with reference to that shipment.

Q. So that this charge appears in this statement as in ordinary statements furnished, does it?

A. It does.

Q. And that has been settled in the same way?

A. Yes, sir.

Q. You have spoken of the manifest of the steamer. What rate was stated upon that for this lot of grain?

A. \$4.10 freight rate.

Q. And what other rates?

A. 25 cents storage.

Q. That was the rate on which freight was charged; that is the sum demanded upon the transportation of this barley? A. It was.

Q. Upon that amount \$2.50 was paid at San Diego?

A. Yes, sir.

Q. And then a demand was made on Moore, Ferguson & Co for the balance of the \$4.35?

A. Yes, sir.

H. W. Goodall, called for libellant, sworn.

Mr. Towle. Q. Were you connected with the Pacific Coast Steamship Company in November last?

A. No, sir; I was not.

Q. What were you doing at that time?

A. I was a member of the firm in which I am now doing business, Piper, Aden, Goodall & Co.

Q. Were you in the office of Goodall, Perkins & Co. at any time when Mr. Cooper and Mr. Cook were having a conversation relating to the shipment of this barley?

A. I was; one Saturday afternoon, after four o'clock. It is the custom of the Pacific Coast Steamship Company to close their office at four o'clock on Saturday. I think all the clerks, or the greater portion of them, had left the office. Mr. Cook came in. I was standing at the counter with Mr. Cooper at the time, and being there, I overheard the conversation between Mr. Cook and him.

Q. State so much of that conversation as you overheard at that time.

A. I understood that the conversation was in relating to some grain of some kind that was in shipment from some point on the narrow gauge railroad—on the Pajaro Valley Railroad to San Diego, to the Howard Commercial Company.

Mr. Treudwell. Please only answer the question put to you. You are asked to state what you heard of the conversation.

Mr. Towle. Strike out what he has said.

A. This is what I heard of the conversation, that I am telling you now. This grain was to be shipped to the Howard Commercial Company from Moss Landing by the Pacific Coast Steamship Company, and had originated on the narrow guage road.

Mr. Treudwell. I submit the witness is not answering the question. He should state what the parties said and who said it.

The Court. (To the witness) Just state what Mr. Cooper said and what Mr. Cook said, as far as you know.

A. As far as I remember, Mr. Cook, representing Moore, Ferguson & Co., came in and wanted to ask Mr. Cooper if some arrangement could not be made whereby this grain could be delivered to Mr. Howard at the rate of \$2.50 per ton; that they had arranged with him that all grain shipped by Moore, Ferguson & Co., to Mr. Howard should not be charged more than \$2.50 freight. Mr. Cooper said, possibly there would be back charges, or railroad charges, at Moss Landing, which Moore, Ferguson & Co. would have to assume in order to secure the release of the grain at the usual rate at San Diego. He impressed that on Mr. Cook in my presence, and agreed with Mr. Cook to write out a telegram that evening, and Mr. Cook was to call in the following Monday morning with reference to the dispatch which was to be forwarded at that time.

Q. That is the substance of the conversation as you remember it? A. That is as I remember it, yes.

Q. That is the only time you were present when this matter was referred to? A. The only time.

The Court. Q. Nothing was said about railroad charges? A. Yes, there was.

Q. What was said about railroad charges?

A. Simply that there would probably be charges of the narrow gauge railroad on this grain which would have to be assumed by Moore, Ferguson & Co., in order to secure the grain at San Diego at the usual rate.

Q. Who said that? A. Mr. Cooper.

Cross-Examination.

Mr. Treadwell. Q. Are you sure that those words were used, or any words relating to the Railroad Company?

A. I am quite sure there were words used in relating to the Railroad Company.

Q. The Railroad Company was mentioned by Mr. Cooper?

A. Yes, sir.

Q. At that time the grain had been shipped, had it not?

A. I don't know anything in regard to that.

Q. You understood from the conversation, that it had?

A. I understood that the grain was in Moss Landing; that is the impression that I got from the conversation.

Q. Can you give the date of the conversation?

A. I could not, exactly. I know it was sometime in November.

Q. The precise date?

A. I understand now, November 3d.

Q. You think now, Nov. 3d?

A. Yes, sir.

Q. At that conversation a telegram was prepared, or agreed to be prepared, to the agent of the Pacific Coast Steamship Company at San Diego?

A. It was.

Q. The grain had been shipped and was on its way, was it not, otherwise there would be no occasion for such a telegram?

A. Possibly it might be at Moss Landing ready to go?

Edwin Goodall, called for the libelant, sworn.

Mr. Towle. Q. You are a member of the firm of Goodall, Perkins & Co.?

A. Yes, sir.

Q. You were in November last?

A. Yes, sir.

Q. Do you remember having the matter of the shipment of this barley by Moore, Ferguson & Co. to San Diego, brought to your attention?

A. Yes, sir.

Q. By whom?

A. By Mr. Cooper.

Q. What, if anything, had you to do with the arrangement that was finally consummated?

A. Well, Mr. Cooper came into my office and informed me—

Mr. Treadwell. We object to any conversation between the witness and Mr. Cooper not in the presence of one of the respondents.

Mr. Towle. I submit we have a right to show that Mr. Cooper was authorized to make this representation.

Mr. Treadwell. There is no dispute about that. The only dispute is the question of fact: did he make it? We insist upon our objection.

The Court. I sustain the objection.

Mr. Towle. You have heard the telegram read?

A. Yes, sir.

Q. Was that submitted to you before it was sent?

A. Yes, sir.

Q. And you authorized it being sent?

A. Yes, sir.

Q. You yourself did not come personally in contact with Mr. Cook or any representative of Moore, Ferguson & Co.?

A. Not at that time; not at any time with reference to this transaction.

Q. What had been the relation, prior to this time, between the company and Moore, Ferguson & Co.—between the Pacific Coast Steamship Company and Moore, Ferguson & Co.?

A. They were very friendly, and are now, so far as I know.

Q. Had accommodations before this been solicited by them?

A. I think so; it is my recollection that they had.

Q. And granted? A. Yes, sir.

Mr. Treadwell. No questions.

Mr. Towle. It is conceded, if the Court please, though there might be technical proof of it, that this grain was shipped from Blanco to Moss Landing on the railroad, and that the back charges were \$1.00 per ton.

Mr. Treadwell. We do not know anything about the fact, but we are entirely willing to take counsel's statement.

Mr. Towle. We rest our case.

Testimony for Respondents.

E. W. Ferguson called for the respondents, sworn.

Mr. Treadwell. Q. You are a member of the firm of Moore, Ferguson & Company, and one of the respondents in this suit? A. Yes, sir.

Q. And were so in November last?

A. Yes, sir.

Q. Will you state how you came to purchase the barley in controversy in this action?

Mr. Towle. We object to the question as immaterial.

Mr. Treadwell. We state our purpose in proving this is: The question at issue is simply which of these witnesses is correct in this recollection of the conversation which took place, and we propose to show circumstances which will determine that necessarily Mr. Cooper must be mistaken.

Mr. Towle. We object to the reasons which operated on him then.

The Court. I do not see that the reasons operating on a person would be a circumstance.

Mr. Treadwell. I had better state what the circumstances are, and then your Honor can rule upon it. In order to determine the credibility of witnesses, to test their recollection and ascertain, in case of conflict, which is correct, the surrounding circumstances may always be looked into for the purpose of ascertaining which is possibly correct. If the circumstances are such that the transaction could not, in accordance with ordinary experience, have taken place, that certainly is a circumstance. The fact is this, which we seek to elicit by this line of questioning. That the transaction concerning this grain had a very narrow margin, and that no business man could by any possibility have entered into this transaction as Mr. Cooper states. That is, would have bought this grain with an indefinite amount of charges on it, if it were true, as Mr. Cooper states, that there might be an indefinite amount of railroad charges on the grain. No ordinarily fair business man could possibly have made such a bargain as this. We think those are proper circumstances to prove, otherwise it is impossible to deter-

mine which is correct. We want to show what the contract was on which he bought the grain.

(After argument). With the permission of the Court, I will withdraw the question to lay a better foundation for it.

Q. Did you have a conversation with Mr. Cooper, who has testified on the stand, through the telephone with reference to this transaction? A. I did.

Q. Do you remember when the conversation occurred? A. I do.

Q. When?

A. It was on the morning of October 25th or 26th. I think the 26th.

Q. Who opened that conversation? A. I did.

Q. State what you said in opening that conversation?

A. I said to Mr. Cooper that we had an inquiry for barley for the Howard Commercial Company at San Diego for 50 tons of barley; that I could not find any in San Francisco; that there was a lot at Moss Landing that was available if a rate could be obtained by which it could be shipped. The barley in the meantime had been quoted to me at a price free on board at Moss Landing.

Q. What did Mr. Cooper reply to that, or did you say anything before he replied?

A. Mr. Cooper could not give me a reply; could not give me a rate at that time. That was on the Produce Exchange. He could not give me a rate until he consulted with his superiors. He was to let me know in a short time—half an hour or so. I did not hear from him.

Q. I am not asking about the further conversation. Is that the whole of this first conversation?

A. That is the whole of the first conversation.

Q. When did you have a conversation with him again on the subject? A. About half an hour later.

Q. How was that conversation held?

A. I called him up again through the telephone.

Q. What did he say?

A. For the rate on the barley he gave me a rate, \$3.10 from Moss Landing to San Diego.

Q. You say he gave you. What did he say?

A. He said the rate on the barley would be \$3.10 from Moss Landing to San Diego.

Q. Did you make any reply to that?

A. I did. I said they had a contract with the Howard Commercial Company, or to that effect, of \$2.50 from San Francisco, and I thought they should be entitled to the same rate, particularly as it was nearer San Diego than San Francisco. He said \$3.10 was the rate.

Q. Was there any further conversation at that time?

A. No further conversation.

Q. At either of those conversations through the telephone did Mr. Cooper say anything to you about charges of any kind on this grain? A. Nothing whatever.

Q. When, if ever, did you first hear anything concerning those charges from the Pacific Coast Steamship Company?

A. After I telephoned to him a second time, after this which I have just related.

Q. State that conversation.

A. Perhaps if I state the conversation I had in the meantime it would be better.

Q. I want to get at the conversations just as they occurred. You have stated the two occurred within half an hour of each other.

A. Yes, sir.

Q. When did the next conversation occur?

A. The next conversation occurred in the afternoon of that same day, somewhere about three or four o'clock, as I remember.

Q. What was the conversation?

A. After completing —

Q. Just state the conversation.

A. The conversation was that I thought a trade had been consummated for the barley, but instead of being 150 tons, there were a certain number of sacks, about 135 tons.

The Court. Did you say 150 or 50 tons at first?

A. Fifty tons at first. If I am allowed to explain, I could tell the circumstances connected with it which made the difference.

Mr. Treadwell. Just state the conversation.

A. That there were 135 tons or 150 tons. I didn't know just exactly the number of tons that it would amount to, only approximately, and that I had prospects of making the trade on the terms which he had quoted — that is, the freight term he had quoted.

The Court. Q. \$3 10 per ton?

A. \$3.10 per ton. I wanted to fortify myself so as to make no mistake, because the margin was very small.

Mr. Torle. Q. Was all this said to him?

A. Not in reference to this margin.

Mr. Towle. Then I ask that it be stricken out.

The Court. Let it be stricken out.

Mr. Treadwell. Q. Only say what you said to Mr. Cooper.

A. I said there were prospects of consummating the trade for the barley, and that there would be, as I stated, 135 or 150 tons of it.

Q. What reply did Mr. Cooper make?

A. I said I thought they ought to be entitled to \$2.50 rate from Moss Landing, particularly as it was in excess of the 50 tons which they were entitled to a \$2.50 rate on. I don't remember that any further conversation took place between us, except that he still refused to give any reduction on the \$3.10 rate.

(An adjournment was here taken until to-morrow.)

FRIDAY, AUGUST 30th, 1895.

E. W. Ferguson, recalled, and direct examination resumed.

Mr. Treadwell. Q. You have related two conversations over the telephone with Mr. Cooper, both occurring on the same day? A. Three.

Q. Yes, three on the same day. When was the next conversation you had with Mr. Cooper?

A. Perhaps before going ahead with that, I have fixed in my mind since I was here before, the exact date.

Q. What was the exact date of the first conversation? A. On the 26th.

Q. October 26th?

A. October 26th. The fourth conversation had with Mr. Cooper on that very day was after I completed the trade for the barley, on the basis of his freight rate, and I telephoned Mr. Cooper immediately that I had made the trade, and closed it on that basis, and that as the Howard Commercial Company had a rate with them of \$2.50 per ton from San Francisco they knew no other rate, and I had to quote them on the basis of San Francisco rates, consequently as there was 60c. per ton more for the barley from Moss Landing to San Diego than from San Francisco to Moss Landing, he should bill us the 60c. here, or we would send a check to the office, as they might desire, which was apparently satisfactory, and so Mr. Cooper stated. Mr. Cooper then, however, made the remark "There may be some advance charges, or back charges."

Q. What were the precise words he used?

A. Back charges.

Q. What did you say to that?

A. I said that we had bought the barley free on board at Moss Landing; of course back charges did not concern us; that we had nothing to do with.

Q. Was that the whole of the conversation?

A. I stated to him at the same time, in regard to arranging for a steamer, to bring it forward as promptly as possible, because they were in a hurry for the barley.

Q. Anything else?

A. There was some question in regard to which steamer would go there first. There was the "Santa Cruz" and the "Bonita," both running down the coast as freight boats, and there was a question as to which

would go first. We wanted it to go by the first freight boat that would go, and we discussed that matter over the line. Nothing definite in regard to it was arrived at.

Q. When was your next conversation with Mr. Cooper?

A. The next morning, the morning of the 27th, Mr. Cooper telephoned to the office—I was there and answered the telephone—stating that they had telephoned to Moss Landing in regard to this barley, and that we had no barley there. I replied, no, that we had no barley there; that we had bought the barley from Waterman & Co. free on board at Moss Landing, and had not yet obtained the warehouse receipt for it. Mr. Cooper stated, or rather requested that we send them the warehouse receipt and give them the details as soon as possible, so that they could arrange for shipment, which I agreed to do. About, probably two hours later, or thereabouts, Waterman & Co. brought in their invoice for the barley, and the warehouse receipt accompanying it, showing the barley to be in Moss Landing warehouse and had been there for a portion of a month, which carried —

Q. You need not state what the contents of the receipt was.

A. We stated to Mr. Cooper that there were back charges —

Q. One moment. Is this another conversation with Mr. Cooper?

A. This was during this time, when I called him up.

Q. That is before you wrote the warehouse receipt?

A. No sir; I have got through with that conversation.

Q. If there was another conversation, state when that occurred?

A. After I got the warehouse receipt.

The Court. Q. After Waterman & Co. brought in the warehouse receipt? A. Yes sir.

Q. You then called up Mr. Cooper again?

A. Yes sir.

Q. The next day?

A. No sir; the morning of the 27th, the same morning, and informed him that we had now the warehouse receipt for the barley.

Q. When was the other conversation when Mr. Cooper told you there was no barley there?

A. That same morning. That was the first conversation. He called me up.

Q. What time of day was that?

A. It was between, I think, 9 and 10 o'clock in the morning.

Q. What time was the last one, or at least, the next one?

A. The next one was, as near as I can recollect, between 11 and 12 o'clock, or somewhere near about 11 o'clock, that same morning. I stated to him that we now had the warehouse receipt for the barley, and that there was a storage charge of 25c. on the warehouse receipt, making 85c. in all that we were to pay them, adding the 25c. storage to the 60c. extra freight, or difference in freight and that we would send them a check for it, or they would

bill it to us, as the case might be, whichever was more agreeable to them.

Mr. Treubwell. Q. What did Mr. Cooper say to that? A. That was agreeable to Mr. Cooper.

The Court. Q. Did you tell him there were back charges of 25c. for storage? A. I did.

Q. And adding the 60c. additional freight rate, it would make 85c.? A. Yes, sir; it did.

Q. In so many words? A. In so many words.

Q. And that you would give them a check for that amount?

A. Or bill it to us, as the case might be. That explained to me Mr. Cooper's remark the day before about back charges, and so that Mr. Cooper would understand it thoroughly, I immediately informed him in regard to this 25c.

(Mr. Treubwell.) Q. Was there nothing more in that conversation?

A. Nothing, except that I stated we would send him the warehouse receipt as soon as possible.

Q. Did you send it to him?

A. I left the instruction in the office in regard to the details of the matter, and it was attended to from the office.

Q. When was your next conversation with Mr. Cooper, if you had any?

A. There was another conversation, I think, during that same day. I would not be positive now, whether it was with Mr. Cooper or with Mr. Evans.

Q. Who is Mr. Evans?

A. Mr. Cooper's assistant—or, with a young man,

that sometimes attends to the telephone, and brings messages back and forth to Mr. Evans and Mr. Cooper. I would not be positive in regard to which of them, but the conversation was to this effect. I asked the question, which steamer they had decided to ship the barley by, because I was anxious to telegraph to the Howard Commercial Company, which steamer it was going by, so that they would make their arrangements accordingly. The reply came back that they had decided to take the barley to San Francisco, and ship it on their regular passenger steamer from San Francisco. That made no difference to me, of course, as long as it reached its destination.

Q. Was that all the conversation?

A. That was all of that conversation.

Q. When was your next conversation with these gentlemen, or either of them?

A. Later again there was a conversation with the office in which—I would not be positive who it was that answered that, either.

Mr. Towle. Q. Was this the same day? Were all these conversations on one day?

A. Yes, sir; as near as I can recollect, they were on the same day. The last conversation may have been on the following day. I would not be positive as to that.

Q. Were they by telephone?

A. All by telephone.

Q. All this was through the telephone?

A. All this was through the telephone.

Mr. Treadwell. Q. October 26th and 27th? ~

A. Yes, sir; possibly this last may have been the 28th.

The Court. That would be Sunday?

A. Then it would not be Sunday. It must have been on the 27th!

Mr. Treadwell. Q. What was that conversation?

A. The conversation was that they had changed their minds in regard to bringing it to San Francisco, and that they were going to ship it by the "Bonita."

Q. Did you have any further conversation with them about it?

A. No, sir; not until after the barley had been delivered; and then this question of freight rates—shall I state that?

Q. No. For whom were you purchasing that barley?

A. For the Howard Commercial Company of San Diego.

Q. Upon what instruction from that company?

Mr. Towle. I object to the question as immaterial.

Mr. Treadwell. That raises a question that was suggested once before, and I desire to follow that out with a remark or two.

[After argument.]

The Court. I shall sustain the objection.

Mr. Treadwell. We will take an exception.

The Witness. I would state here, if the Court will allow me—

The Court. Mr. Treadwell will ask you such questions as are proper.

The Witness. At the time that Mr. Cooper and I—

Mr. Treadwell. Never mind that. If you omitted any statement in any of those conversations which you have referred to, you can supply the omission; otherwise you need not say anything.

A. It was not a conversation.

Q. Never mind then. At the time of this transaction, or during any portion of the time occupied in these negotiations, did you know where this grain came from?

A. I did not.

Q. Did you know anything about the arrangement between the Pacific Coast Steamship Company and the Railroad Company?

A. I did not.

Q. Or did you know that they had any arrangement with them?

A. No, sir.

Q. Had you had any information on that subject, from any source?

A. None whatever.

Q. At any time since have you offered to pay any money on this account to the Pacific Coast Steamship Company?

A. A check has been sent from our office.

Q. I ask you if you made any offer?

A. Personally I did not.

Q. Who did?

A. It was made by instructions, from the office.

Cross-Examination.

Mr. Fowle. Q. On how many different dates did these conversations occur, Mr. Ferguson?

A. They occurred on two dates.

Q. The 26th and 27th?

A. The 26th and 27th.

Q. All over the telephone?

A. All over the telephone. The last conversation—

Q. Never mind the last conversation. Just answer the question.

A. (Continuing)—may possibly have been later than the 27th.

Q. In those conversations do I understand you to say that Mr. Cooper quoted to you a freight rate?

A. Yes, sir.

Q. Do I understand you to say that the proposition of the Howard Commercial Company paying \$2.50 per ton was broached between you and Mr. Cooper?

A. Yes, sir.

Q. And he agreed to it at that time?

A. That he had agreed to the \$2.50 rate?

Q. No. That he agreed that the Howard Commercial Company should pay \$2.50, and the balance should be collected from you, in those conversations which you have testified to?

A. That he was to collect from the Howard Commercial Company the \$2.50, and collect the difference from us.

Q. You say that was the arrangement between you and Mr. Cooper, by telephone?

A. Yes, sir, it was.

Q. On these dates? A. On these dates.

Q. Which one of those dates?

A. On the day of the 26th, the 60c. was agreed upon. On the 27th, when the back charges of 25c. additional were known, then I told him that the 25c. would be added to the 60c., making 85c. instead of 60c.

Q. When was the order to ship the grain given?

A. The order to ship the grain was given on the 27th.

Q. At that time you had the warehouse receipt?

A. We had the warehouse receipt.

Q. Prior to the 27th you had not seen it?

A. I had not seen the warehouse receipt prior to the 27th.

Q. Your arrangements with Waterman & Co. were that it should be furnished to you free on board?

A. Free on board at Moss Landing.

Q. So that the back charges did not concern you, whatever they might be? As between you and the Howard Commercial Company, for whom you were buying, whether it was 25c. or \$2.50 was no concern of yours?

A. Did you say it was no concern of the Commercial Company?

Q. No concern of yours; having bought it free on board, the amount of back charges there on it was no concern of yours, or the Commercial Company?

A. No, sir.

Q. Then, how did it happen that you were negotiating with reference to paying the back charges, when Waterman & Co. were to pay those, and furnish it to you free on board?

A. Waterman & Co. did pay it, and I have got the bill here in regard to it, of the back charges, except the 60c.; that is, they deducted the 25c. from their invoice to us. The 60c. they had nothing to do with, because that was a difference in the Howard Commercial Company's contract with the Pacific Coast Steamship Company.

Q. Then when you finally arranged with Waterman & Co. you arranged with them that the back charges with them should be 25c. a ton? A. No, sir.

Q. When did you settle with Waterman & Co.?

A. I paid them—I gave them a check on their invoice on presentation of the warehouse receipt, deducting the charges which the face of the receipt called for, on the morning of the 27th.

Q. You paid them in full on delivery of the receipt?

A. Yes, sir; less the charge which the warehouse receipt called for, which is customary with negotiable warehouse receipts.

Q. You made no inquiry as to other charges upon the grain?

A. I did not, because it was not customary. Negotiable receipts are always payable in that way in the grain business.

Q. Since the controversy arose, have you made any demand on Waterman & Co. that they pay these back charges?

Mr. Treadwell. I object to the question as immaterial.

The Court. I sustain the objection.

Mr. Towle. Q. Had you any understanding with Waterman & Co. as to their liability to pay those charges? A. I have not.

Q. Do you know whether or not any one else had conversations with representatives of the steanship company about this same matter, after you did?

A. What is that?

Q. Whether anyone else representing Moore, Fer-

guson & Co. had conversations with representatives of the steamship company in regard to this matter, after you did?

A. Not as to contracting, but simply as to carrying out the details.

Q. Do you know of any visits that Mr. Cook paid?

A. Mr. Cook informed me that he had paid visits there.

Q. Did you regard this whole matter as definitely arranged when you finished your conversation by telephone? A. I did.

Q. If that was so, what occasion was there for Mr. Cook to go there?

A. To deliver the warehouse receipt, and get the receipt for it, or a shipping receipt for the barley.

Q. Upon what date was that done, if you know?

A. I judge that that was on the 27th, because that was the date on which the shipping instructions were given.

Q. That is the date that you were there?

A. I was not there at all.

Q. Or that you telephoned, then? A. Yes sir.

Q. Did you give Mr. Cook the receipt?

A. I did not.

Q. How did he get it, if you know?

A. Mr. Cook is a member of the firm, and has access to all such papers.

Q. Who got the receipt from Waterman & Co.?

A. I did.

Q. When you got it, did you deliver that to Mr. Cook?

A. My recollection is, that I delivered it to our bookkeeper or cashier.

Q. On that same day ?

A. On that same morning, immediately.

Q. Your impression is, that the receipt was turned over to the steamship company on that same day, the 27th of October ?

A. That is my impression.

Q. Did you get a shipping receipt from the steamship company, on turning that over ?

A. We did not, as far as I know.

Q. Did you at any time ?

A. We have got an acknowledgment, I have got it in my pocket now.

Q. What sort of an acknowledgment ?

Mr. Treadwell. The paper will speak for itself.

Mr. Towle. Yes. Let me see it.

A. That is from Moss Landing however some days later.

Q. This is not from Moss Landing. (Handing it to the witness.)

A. I supposed it was. It is from Castroville.

Q. It is a letter to the agent there ?

A. I did not read it carefully.

The Court. Q. Do Waterman & Co. have a place of business in this city ? A. Yes sir.

Q. Grain dealers ? A. Yes sir.

Mr. Towle. Q. Is not this the fact, Mr. Ferguson, that you telephoned and asked Mr. Cooper whether it could not be arranged that the Howard Commercial Company should pay \$2.50, and that you here should

pay the difference, and that he said he thought it could?

A. I stated the difference—I stated the amount of the difference, and he said yes.

Q. I am asking you if this was not the conversation; whether you did not inquire of him whether such an arrangement could not be made, and that he said he did not know, but he thought maybe it could? Is not that the extent to which those negotiations had gone between you and Mr. Cooper, by telephone?

A. It was not.

Q. You are certain of that?

A. I am certain of that. The conversation and the contract was completed with Mr. Cooper in regard to it.

The Court. Q. You say Mr. Cook is a member of the firm? A. Yes, sir.

Q. And had full authority to transact business for the firm? A. Yes, sir.

L. H. Garrigus, called for the respondents, sworn:

Mr. Treadwell. Q. Where do you live?

A. I live in Salinas City.

Q. Are you acquainted at Moss Landing?

A. Yes, sir.

Q. Do you know whether any grain is raised around Moss Landing?

Mr. Towle. Objected to as immaterial. It is a collateral issue that does not cut any figure.

The Court. I overrule the objection.

A. Yes, sir.

Mr. Treadwell. Q. How is that grain taken to the warehouse at Moss Landing?

A. By a team, usually.

Q. Is there any considerable quantity of grain hauled to that warehouse by team?

A. It varies every year.

Q. Last year about how much grain, have you any idea?

A. It must have been several hundred tons.

Cross-Examination.

Mr. Toule. Q. Are you familiar with the business at those warehouses? A. Yes, sir.

Q. The extent of it, I mean?

A. The extent of the business at the warehouse?

Q. Yes. You are not a grain dealer.

A. As much so as a dealer.

Q. I ask you if you know generally; I do not mean particularly? A. Yes.

Q. What proportion of the grain handled by the warehouses is raised within what you call near Moss Landing?

A. I suppose about over one-tenth.

Q. Would it be over one-twentieth?

A. That would be a matter of guess work.

Q. Is it mere guess work? The large bulk of the grain comes by rail, does it not?

A. Since the railroad is built, yes.

Q. How long has the railroad been built?

A. About three or four years.

The Court. Q. What is the length of that Salinas Valley Railroad, or was it last year?

A. It extends from Salinas City to the town of Watsonville; it is twenty miles. Moss Landing is about half way between the two points, Salinas and Watsonville.

Q. Moss Landing is the terminus of the railroad, is it not?

A. No, sir; the road passes right along by Moss Landing, and goes to Salinas from Watsonville.

Q. How far is it from Watsonville to Salinas?

A. Twelve miles by the county road.

Q. By this road? A. Somewhat less.

Q. How far is it to Watsonville?

A. Twenty miles.

Q. From Moss Landing?

A. No, sir; from Salinas I do not know how far it is from Moss Landing to Watsonville. I have never been over the road but once, and then by rail. By the county road I have driven a great many times, and it is twenty miles. It is called twenty miles.

Mr. Fowle. Q. Moss Landing proper is not a ranch, is it? A. No, sir.

Q. No grain is raised there? A. No, sir.

John Cook, called for the defendants, sworn.

Mr. Treadwell. Q. You are one of the respondents in this suit? A. I am.

Q. A member of the firm of Moore, Ferguson & Co.?

A. Yes, sir.

Q. You were a member of that firm in October and November last? A. I was.

Q. Did you ever have a conversation with Mr. Cooper, or any other representative of the Pacific Coast Steamship Company, with regard to the main controversy in this action? A. I did.

Q. When, and with whom was the first of those conversations?

A. As near as I can recollect, it was on Friday, October 26th. After the transaction had been completed by Mr. Ferguson, of the purchase of the barley, I called on Mr. Cooper and asked him the question, if Mr. Ferguson had arranged with him to ship this particular lot of barley from Moss Landing to San Diego, to the Howard Commercial Company, and as the Howard Commercial Company was entitled to a \$2.50 rate from San Francisco, the rate they were to charge us from Moss Landing to San Diego would be \$3.10, and we would pay them the 60c. difference, and he said it had been arranged.

Q. Where did the conversation take place?

A. In Goodall, Perkins' office.

Q. Was there anything further at that conversation?

A. Nothing.

Q. When was your next conversation?

A. The second conversation was on the following day.

Q. Where was that?

A. That was in the same office.

Q. What was the conversation?

A. I told Mr. Cooper that we had received the re-

ceipt for the barley, and I asked him the question as to how we would settle with them for the difference. I also stated that there was a 25-cent storage charge on the receipt.

Q. Did you have that receipt with you at that time?

A. Not at that time, no, sir—and I suggested that the better way to settle the matter would be to give them a check for this amount. At the time I gave Mr. Cooper a credit memorandum on a blank piece of paper which was in the office, on the desk. I specified so many sacks of barley, and so many pounds, at 60 cents, covering the difference in tare, one item, and also another item of 25 cents, covering the storage, and gave them a written memorandum of the amount. The understanding was, when the barley would be shipped, that he would get a check for it, either by presenting his bill, or he would take a check to the office.

Q. What did Mr. Cooper say when you gave him that memorandum?

A. He had no objections at all.

Q. Anything further occur at that conversation?

A. Nothing.

Q. When was your next conversation?

A. The next conversation was when I brought him in the warehouse receipt.

Q. What day was that?

A. This was, I think, on Monday.

Q. Monday, October 29th?

A. Monday, October 29th.

Q. What was that conversation?

A. I handed him the receipt and did not discuss the

matter with him particularly, because we had talked the matter over thoroughly before, and I did not refer to it specially. I just handed him the warehouse receipt. By the way, I might say, when I presented the warehouse receipt I asked if he would not give me a shipping receipt for the barley then. He said no, that that part of the transaction would have to be consummated at Moss Landing, that the warehouse receipt would be forwarded to Moss Landing, and we would get our shipping receipt from there.

Q. I will ask you if this is the warehouse receipt to which you refer? (Handing.)

A. It is identical in substance. It contains the correct number of sacks of barley, and the correct number of pounds, according to the memorandum that I gave Mr. Cooper.

You cannot positively identify the paper, I understand? A. No, sir.

Mr. Treadwell. Will counsel admit that this is the warehouse receipt in question?

Mr. Towle. Yes.

Mr. Treadwell. We offer the receipt in evidence. It reads as follows:

“No. 1023. Moss Landing, Monterey County, Cal.,
 “Oct. 15th, 1894. Received at the Pacific Coast Steam-
 “ship Company’s Moss Landing warehouses, from J. R.
 “Silveira, twenty-four hundred and forty-eight (2448)
 “sacks of barley, weighing at Moss Landing 271,510
 “pounds, for storage and shipment to San Francisco, at
 “the rates, and subject to the conditions, on reverse side
 “hereof: stored in warehouse No. 1, 280 sacks; No. 2,

“ 1015 sacks; No. 3, 1153 sacks; 2448 sacks. Pacific Coast Steamship Co., by S. N. Laughlin, Agent.”

The endorsements on the back are so long that I suppose counsel will waive my reading them. The material portions are these: “ Rates and conditions”—

Mr. Towle. If you read any, you should read all.

Mr. Treadwell. Very well, I will read all. I simply did not want to take up time.

“ RATES AND CONDITIONS.

“ The within mentioned goods are received, subject to the following Rates and Conditions:

Rates for 2,000 Lbs.

- “ Storage for the first month or fraction of month after Oct. 12, 1894 25c.
- “ For each additional month or fraction of a month 25c.
- “ But not to exceed for the season ending July 1st, 1895 75c.
- “ For transportation to San Francisco, via Pacific Coast S. S. Co.’s Vessels, including Wharfage, Loading, Handling, Weighing, etc., at Moss Landing, as follows:
- “ Wheat, Barley, Corn, Oats, Potatoes, Beans, Peas, Flax Seed, Mustard Seed, Onions, Bird Seed, Corn Meal, Cracked Corn, Rye Meal, Ground Barley, Middlings, and Malt \$3.50
- “ It is expressly understood that the Pacific Coast Steamship Co. or any connecting company, or any one interested in or employed by such companies, shall not be held responsible, or liable for any loss or dam-

“age resulting from any of the following causes, viz:
 “The elements, perils of the seas, dangers of naviga-
 “tion, surfing, fire, storms, earthquakes, shrinkage,
 “handling and vermin, or any other causes beyond the
 “control of the company or companies. Connecting
 “companies not responsible for loss, or damage, except-
 “ing on their own line.

“While the goods are in the warehouse, the company
 “shall be liable only as warehousemen, and not as car-
 “riers.

“Goods may be withdrawn from warehouse for local
 “use or consumption on payment of accrued storage and
 “endorsement of and surrender of warehouse receipt.

“Goods to be stowed on deck or below deck, at op-
 “tion of master.

“*Important Notice.*—The law makes it a felony, and
 “imposes a penalty of \$5,000 for shipping goods with-
 “out the order of the owner endorsed on the warehouse
 “receipt, and the surrender of the receipt. Therefore,
 “when you want the within mentioned article shipped,
 “fill out in ink the following order, and send it to the
 “warehouse.”

The receipt is endorsed, “J. R. Silveira, shipped by
 “steamer ‘Bonita,’ Nov. 2, 1894.”

(*The paper is marked “Respondent’s Exhibit A.”*)

Q. When was your next conversation?

A. I cannot recall that date. It was subsequent to
 the shipment of the barley from Moss Landing to San
 Diego.

Q. How did you come to have it? That will fix it,
 perhaps? A. I do not understand the question.

Q. How did you come to have that conversation? Was it at your suggestion or at Mr. Cooper's?

A. I called on Mr. Cooper.

Q. State what occurred.

A. This was the interview I had with Mr. Cooper subsequent to the delivery to him of the warehouse receipt.

Q. What was it?

A. I called on him. They had not presented their bill in the mean time for this difference of 85c. per ton, and as the Howard Commercial Company were entitled to a \$2.50 rate on all the shipments which we were forwarding from San Francisco to them at San Diego, I did not wish this 85c. to go forward on the Howard freight bill as a back charge, because it would complicate our accounts to some extent, and require a crediting process, which I wished to avoid. I requested Mr. Cooper to telegraph his agent at San Diego to deliver this grain to the Howard Commercial Company, collecting of him the rate which he was entitled to from San Francisco, \$2.50 per ton, and we would pay him the difference of 85c. This was late in the afternoon.

Q. When you say late in the afternoon, about what hour?

A. I should judge possibly half-past five o'clock.

Q. Very well; proceed.

A. He then started the subject of back charges, the first reference which we had to them. I told him—

Q. What did he say?

A. He said there might be some back charges on that grain that he did not know the amount of. I said to

him, that he knew precisely what the back charges were, because he had obtained a negotiable warehouse receipt from Waterman & Co., and the amount the warehouse had earned up to that time according to the specifications in the receipt, was 25c. per ton.

Mr. Cooper's reply to me was, that he had not examined the warehouse receipt, and consequently was not in a position to know what those charges were. My reply to him was, I had examined it very carefully, because we had paid for the grain, and was very careful to scrutinize it and see the amount of the charges which the warehouse receipt covered were deducted before we made our payment.

Q. Anything further?

A. Then he referred to the subject of possibility of freight from Blanco.

Q. What did he say about that?

A. He said there might be some freight on that grain from Blanco. My reply to him was, if there was any back freight against that particular lot of grain, it would be so specified on the warehouse receipt, because the warehouse receipt was a negotiable instrument received by bankers here as collaterals, and would be received by any concern that was advancing money on property of that kind, and if there were back charges it would be specified on the warehouse receipt, in order to constitute a lien against the grain.

Q. Anything further? Go on and state everything that occurred at that conversation.

A. We discussed the matter pro and con, he maintaining his position that there might be a freight charge,

and I claiming that it could not be possible under the existing circumstances, according to the terms of the warehouse receipt, and he agreed to telegraph his agent at San Diego, and we would pay him the difference of 85c. per ton.

Q. Anything further at that conversation?

A. I might say that that telegram he agreed to send the following morning. He said it was late in the day, and he would defer sending it until the following day.

Q. Was the telegram prepared at that time?

A. I am not in a position to say.

Q. Was that all of that conversation?

A. That was all.

Q. Was any other person present at that conversation besides yourself and Mr. Cooper?

A. Not that I remember.

Q. Did you notice the presence of Mr. H. W. Goodall at that time? A. No, sir.

Q. You did not have any conversation with him?

A. None at all. Mr. Cooper is the only man I interviewed concerning the transaction.

Q. Did you have any further conversation with Mr. Cooper or any one else belonging to the Pacific Coast Steamship Company, on that subject?

A. None, as far as I recollect.

Q. Did you ever make any payment, or offer of payment, to the Pacific Coast Steamship Company on this account? A. We did.

Q. When was that?

A. We made them an offer of payment on November 16th, 1895.

Q. How was that done?

A. There was a statement made in the transactions accompanied by our check, signed by myself, and forwarded by our clerk to the office of the Pacific Coast Steamship Company.

Q. Was the statement in writing?

A. The statement is in writing.

Q. Please produce the statement?

A. Here it is. (Handing.)

Mr. Treadwell. Will counsel admit that this statement and check was presented on that date to the Pacific Coast Steamship Company, and the acceptance of the check refused?

Mr. Towle. Yes; if the witness states so. It was refused because it was not the amount due.

Mr. Treadwell. Certainly.

Mr. Towle. It was refused in settlement of their demand.

Mr. Treadwell. I suppose that is a fact. (Reading.)

“ SAN FRANCISCO, NOV. 16, 1894.

“ Mess. GOODALL, PERKINS & Co.

“ Bought of MOORE, FERGUSON & Co.

“ Grain, Flour and Wool Commission Merchants,

“ Agents California, Walla Walla and Oregon

“ Flouring Mills,

“ No. 310 CALIFORNIA STREET.

“ Terms—Credit Memo.

“ 2,448 sks. Barley, 271,510, at 85c. per ton, \$115.35

“ 2d June, Moss Landing to San Diego,	\$3.10.
“ “ San Francisco to “ “	2.50.
	<hr/>
	.60
“ Storage on Barley in W'hse,	.25
	<hr/>
“ Difference due G. P. & Co.,	.85
“ Adjustment on 2,558 sks Barley shipped	
“ from Moss Ldg. to Howard Com. Co.,	
“ San Diego, in Oct., '94.”	

The check accompanying it is a check of Moore, Ferguson & Co., on the Sather Banking Company, in favor of Goodall, Perkins & Co., for \$115.39.

(The paper is marked Respondent's Exhibit "B.")

Q. At any time during these transactions did you know where this barley came from? A. No, sir.

Q. When did you first hear where it did come from, or hear anything about it?

A. It was when Mr. Cooper made the remark that there might be back charges on it from Blanco.

Q. That was at the conversation at which the telegram was arranged? A. Yes, sir.

Q. And at that time the grain had already gone forward from Moss Landing to San Diego?

A. It had, because I had forwarded the receipt.

Q. Did you ever, at any time prior to that, have any information that there was, or might be, any railroad charges, or freight charges on this barley?

A. None whatever.

Q. Did you at that time know, or had you ever heard, anything of the relations between the Pacific

Coast Steamship Company and the Salinas Valley Railroad Company? A. I never had.

Cross-Examination.

Mr. Toule. Q. When was this conversation to which you referred, with reference to the time when the telegram was sent by Goodall Perkins to their agent at San Diego?

A. As near as I can recollect, it was on Saturday.

Q. This conversation was on Saturday?

A. Yes, sir.

Q. The telegram was sent the following Monday.

A. I have no knowledge of when the telegram was sent. Mr. Cooper made the remark that it was late in the day, and he would defer sending the telegram until the morning. I think that was the language he used.

Q. When was the telegram written?

A. I cannot answer that question.

Q. Did you not see it when it was written out?

A. I did not.

Q. Are you certain about that?

A. I am decidedly so.

Q. This conversation on the Saturday was the final conversation between you and Mr. Cooper, as you remember it, relating to the way in which freight charge should be handled, was it?

A. It was the final conversation, so far as I can recollect it now.

Q. Whatever was done at that conversation was the final result of all the conversations which had taken

place, including this conversation? That was the final understanding between the parties?

Mr. Treadwell. Objected to as calling for a conclusion.

Mr. Towle. Q. As you understood it. Did you so understand it, that this conversation on the Saturday afternoon, between yourself and Mr. Cooper, included the terms of this shipment?

A. There was no reference made to any prior conversation that we had.

Q. Did you understand that the matter was definitely settled on that afternoon? A. I did.

Q. You say that on that afternoon Mr. Cooper did refer to the facts that there might be other charges than the warehouse charges—these railroad charges?

A. Back charges he specified first.

Q. You say he spoke of Blanco. Are you familiar with that country down there? A. No, sir.

Q. Did you understand that Blanco meant a railroad charge?

A. That was the intimation from his remark.

Q. That was what you understood by it, was it not?

A. Yes, sir.

Q. That Mr. Cooper then informed you that there might be back railroad charges on this freight?

A. Yes, sir.

Q. That is what he meant to convey?

A. That is what he meant to convey in the latter part of his conversation.

Q. And that is what you understood?

A. Yes, sir.

Q. And then insisted that there could not be any such charges? A. I did.

Q. He, on the other hand, maintained his position that he was fearful there was such a charge?

A. Yes, sir, he said there was a possibility of it.

Q. Yet you say that in the face of that he agreed to waive that possibility?

A. He agreed to wire his agent at San Diego to collect freight of Howard at the rate of \$2.50 per ton, and we were to pay him the difference which amounted to 85c.

Q. Was there an express statement of 85c. from him?

A. I stated that expressly to him.

Q. Did he agree to that? A. He did.

Q. Did he not say that he would send a wire to San Diego to collect \$2.50; to deliver on payment of \$2.50, and you then should pay the difference, whatever it might be? A. No, sir.

Q. Was not that his proposition?

A. I do not know what his proposition was. I know what he stated.

Q. What argument did you use to induce him to recede from his position, that there might be other charges than those you stated?

A. As I have already stated, I claimed that was a negotiable warehouse receipt issued by their own company, accepted by all grain dealers, and that if there were any back charges at all that constituted a lien against that grain, which would be so specified on the receipt.

Q. Is it not true that you, trusting to your construction of that contract, were willing to take the chances on whether there would be back charges on that or not, and you said, 'All right, ship it, and we will pay the difference?'

A. The 85c.

Q. Without saying the 85c.?

A. Yes, sir; I specified 85c.

Q. Is it not true that you, relying on your construction of that negotiable receipt, as you term it, said to yourself, "It does not make any difference whether there are or not, they cannot collect from me, and I will pay the back charges?'

A. Not necessarily,

Q. And Mr. Cooper did not agree to accept the 85c, Were you not induced to agree that it should go forward on the general order standing, because of your reliance on your construction of the receipt?

A. No, sir. I had discussed the subject thoroughly with Mr. Cooper prior to this time, giving him a written memorandum of what we pledged to pay, and I did not depart from that understanding at all.

Q. When was that memorandum given?

A. That was at the second interview.

Q. That was on the 27th of October?

A. I think that was on the 27th.

Q. In what shape was that memorandum?

A. In the Pacific Coast Steamship Company's Office they have blanks of figuring paper on the desk, possibly a little larger than that. (Pointing). I had this memorandum at the time I gave Mr. Cooper the figures, be-

cause it was an unsettled transaction, and I was attending, to a large extent, to the outside business. We were shipping to Howard largely at that time, and I took a blank—this pad that was on the desk—and wrote out an itemized statement of this credit, and handed it to Mr. Cooper personally.

Q. That was a mere statement of what you understood the situation to be, was it not?

A. Yes, sir; and what he understood it to be, according to our conversation?

Q. You did not understand, then, that he accepted that as a true statement of the situation?

A. I did.

Q. Did he express himself?

A. He did not express himself one way or another. He did not object to it.

Q. He simply took what you tendered him as your figures?

A. Yes, sir; I told him that is what we would have to pay them

Q. He did not accept them as the limit of liability in this matter?

A. He accepted our statement. We did not discuss the matter thoroughly. I presume that, being familiar with the transaction in all its details, if my figures to him were incorrect in any way—

Q. What I am getting at is this: There was no express understanding between you and Mr. Cooper at that time, that he would forward this grain, collecting \$2.50 below, on your payment to him of that amount?

A. There was a distinct understanding.

Q. On this day in October?

A. On this day in October.

Q. How did this matter come up in the shape it did on this subsequent day in November, this Saturday afternoon?

A. You ask me if I can account for it?

Mr. Treadwell. We object to the question, because the witness has not testified to any such conversation in November.

Mr. Fowle. Whatever the date is.

The Court. October 26th and 27th.

Mr. Towle. Was Saturday the 27th.

Mr. Treadwell. Yes.

A. Please state the question again.

Mr. Towle. Q. If this arrangement was definitely made at the time you stated, how did it happen that the matter was opened up again by this conversation relating to it on the Saturday afternoon?

A. Mr. Cooper opened the matter personally. The way I account for it is this. At the time he made his arrangements with us it did not occur to him there was any railroad charges against this grain that was to be shipped south. In his language to me he did not give the slightest intimation of any such possibility. When the grain was about reaching its destination, and I requested him to telegraph his agent at San Diego to collect the \$2.50 from Howard, it occurred to me that that dollar credit was brought to his recollection, and it was an error of his own, and he wanted to push it off on us.

Q. This was on the 27th. Why did you not say to

him in that conversation, "This has all been determined?"

A. I did not say that in so many words, but the attitude which I assumed towards him and my conversation with him determined that.

Q. You did not say to him, "This matter has been arranged before," did you?

A. I do not think I repeated those words.

Q. Or anything equivalent to them?

A. Or anything equivalent to them.

Q. Whereabouts in the office on this Saturday afternoon did this conversation take place?

A. In Goodall Perkins' office,

Q. In the outer office?

A. In the main office, close to Mr. Cooper's desk, The office at that time was differently arranged to what it is now.

Q. What time in the afternoon was it?

A. I should judge it was about half-past five. It was towards evening.

Q. On Saturday afternoon? Is that office open on Saturday afternoon at half-past five, to your knowledge?

A. Whether this was Saturday afternoon or not. I am not certain in my own mind. I know this last conversation took place between Mr. Cooper and myself in the afternoon late. The remark that Mr. Cooper made concerning the telegram, was that on account of the lateness of the hour, he would not send the wire until the morning. If I recollect correctly, there must have been a holiday about that time.

Q. If Saturday was the 27th, and this was on the

27th, I suppose it was Saturday afternoon, and it was a sort of a holiday in the office when you got there; that is, most of the people had left.

A. Mr. Cooper was there. He was the only gentleman I had any desire to confer with.

Q. Did you see any one else standing there?

A. I cannot recollect that I did.

Q. Do you say that no one else was near?

A. I cannot tell that.

Q. You would not deny that some one else was there? You heard Mr. Goodall's testimony? A. Yes, sir.

Q. You would not say he was not there?

A. I would not deny that Mr. Goodall was there, but I cannot testify that I saw him there at that time.

Q. You was not concerned whether some one was there or not? A. No, sir.

Re-direct Examination.

Mr. Treadwell. Q. I should like to have you refresh your recollection as to the date of that conversation concerning that telegram. How much time had lapsed from the beginning of this transaction up to the time that that last conversation was had?

A. It was quite a number of days, as near as I can recollect, for the reason that there was some delay in the forwarding of the grain.

Q. That is what I supposed.

A. It did not go forward as quick as Goodall, Perkins had anticipated it would go, or we either.

Q. Then this conversation could not have occurred on October 27th, could it ?

A. I don't think it could.

Q. May it not have been as Mr. Goodall states it, to have occurred on November 3rd, the Saturday following?

A. I think it quite possible when I recall the fact that there were several days intervening on account of the grain not going forward promptly.

Further Cross-Examination.

Mr. Towle. Q. You think, then, this last conversation was on November 3rd, do you?

A. My opinion is that it was quite a number of days after I had delivered to Mr. Cooper the warehouse receipt.

Q. That had direct reference, did it not, to procuring a telegram to be sent to deliver this grain on payment of \$2.50 a ton?

A. That conversation had; yes, sir.

Q. That is what you want to get at that time?

A. Yes, sir.

Q. That conversation brought up the exact condition on which such a telegram would be sent, did it not?

A. Yes, sir.

Q. And then it was that Mr. Cooper stated that those back charges might exist?

A. Yes, sir.

Q. Then it was that it was arranged that a telegram should be sent with the understanding that the balance of freight should be paid here?

A. The balance of the freight, together with the storage.

Q. And then it was in connection with that, that the discussion arose as to the probability of railroad charges, in addition to the freight charges and storage, about which the understanding arrived at, the difference existed between you and Mr. Cooper?

A. As I have already stated, Mr. Cooper insisted that there might be back charges first. Then, when I explained to him about the warehouse receipt carrying the charges, he mentioned the freight proposition.

Q. The conversation grew out of the fact that there came a definite request for instructions from the office here to the San Diego agent to deliver, on receipt of \$2.50 a ton?

A. Yes, sir.

Q. And as the result of that conversation, whatever it may have been, the authorization was sent from this office to deliver on payment of \$2.50 a ton. Up to that time you had had no such instructions issued by this office?

A. I do not exactly understand your question.

Q. Up to that time there had been no instructions issued? You had procured no instructions from Goodall, Perkins & Co., to deliver that grain on receipt of \$2.50 per ton, at San Diego?

A. Yes, sir; that was in harmony with our previous arrangements.

Q. I say, up to that time you had procured from them no instructions to their agent in San Diego?

A. None that I am aware of.

Mr. Treadwell.—Q. Had you prior to that conversation learned anything about it?

A. None.

Q. Had you heard anything about how they had billed it? A. Nothing in any way whatsoever.

Mr. Treadwell. Will counsel admit that, with the filing of their answer in this case, the respondents deposited in the registry of the Court, in pursuance of their answer, the sum of \$115.39?

Mr. Towle. I do not know anything about it. I presume they did. Yes, they did.

Mr. Treadwell. We rest.

G. H. Cooper. Recalled in rebuttal.

Mr. Towle.—Q. You were asked yesterday on cross-examination as to whether there were any entries in the office of the Steamship Company relating to this shipment, and showing this charge of \$1 per ton. You said you knew of none. Have you since examined with reference to that? A. I have.

Q. Do you find such entries?

A. I find some; yes, sir.

Q. You were also asked whether there was, in the records of the office here, any evidence that a similar charge had been made on similar shipments?

A. Yes, sir.

Q. Shipments of this character, outside of this one?

Mr. Treadwell. The question we asked was, "On any prior occasion."

Mr. Towle.—Q. Have you examined with reference to that? A. Yes, sir.

Q. Have you found any such entries?

A. Yes, sir.

Q. Have you here the evidence of it?

A. Yes, sir.

Q. Is it in these books produced (pointing)?

A. In those books? yes, sir.

Q. Be kind enough to look at these. In this paper entitled "Manifest of Cargo from San Francisco to Moss Landing to San Diego, per steamship 'Bonita,' Captain R. W. Anderson, purser, J. J. Carroll, September 20, 1894," one of the records to which you have referred?

A. Yes, sir.

Mr. Towle. The item referred to is under the head of "Shipper. Wahailich, Cornett Co. Consignee, N. C. Nason & Co. From Blanco ex P. V. R. R., 500 sacks of potatoes. Weight, 58,720 lbs. Rate, \$4.10. Freight, \$120.38; 29-4/10 tons. P. V. R. R. 58,720 lbs., at \$1, advance charges, \$29.36."

Q. Have you here the manifest of the steamer "Bonita" of this date? A. I have.

Q. Is this the manifest (producing)?

A. That is the manifest.

Mr. Towle. The paper is entitled "Manifest of cargo, November 2, 1894, from San Francisco to Moss Landing, to San Diego, per steamship 'Bonita,' Captain P. Doran, Purser, J. J. Carroll. Shipper, Moore, Ferguson & Co. Consignee, Howard Commercial Company. From Blanco ex P. V. R. R., marks 96. Packages, 2448 sacks of barley. Weight, 271,510 lbs. Rate, \$4.35. Freight, \$590.53. Total, \$590.53. 135-8/10 tons. P. V. R. R. 271,510 lbs., at \$1, \$135.76. S. D. 1/8 of \$454.77."

The next item is: "Shipper, Brown & Laurence. Consignee, Nason & Co. Mark 8. 271 sacks spuds. 33,800 lbs. Double cross. 201 sacks spuds, 25,680 lbs. 256 sacks of spuds, 32,100 lbs. Total weight, 91,580

lbs. Rate, \$4.10. Freight, \$187.74. 45-8/10 tons. P. V. R. R., 91,580 lbs., at \$1, \$45.79. S. D. 1/8 of \$141.95."

The next item on the same manifest is: "Shipper, S. N. Laughlin. Consignee, H. C. Treat & Co. Marks, 89. 200 sacks of wheat. Weight, 27,120 lbs. Rate, \$4.10. Freight, \$55.60. 13-6/10 tons. P. V. R. R., 27,120 lbs., at \$1, \$13.56. S. D. 1/8 of \$420.40."

Q. Those are items referred to as representing similar shipments on which similar advance charges were collected? A. Yes, sir.

Q. Have you any entry in other books in the office showing the carrying of a credit of this \$1 to the railroad?

A. Yes, sir.

Q. Will you turn to those?

Mr. Treadwell. Do you refer to the particular items that you have just been reading?

Mr. Towle. Yes.

Mr. Treadwell. This is not necessary. We will admit that it was carried to the credit of the railroad company in other books.

Mr. Towle. But contemporaneously.

Mr. Treadwell. Contemporaneously with those papers—contemporaneously with the transaction?

Mr. Towle. Yes.

Mr. Treadwell. Go on. I do not see what difference it makes.

A. Here is a credit of the particular shipment in question to the railroad company.

Mr. Towle. The entry which I offer in evidence now is on page 233 of freight book 90: "Pacific Coast Steam-

ship Company. Freight on cargo steamship 'Bonita', voyage 419. From San Francisco to San Diego and way ports and return. Sailed from San Francisco November 1st, 1894. Arrived in San Francisco November 9th, 1894. Entire charges on shipment. \$590.53. From Blanco to San Diego. Credit P. V. R. R. 27,510 at \$1, \$135.76."

Q. Is there any entry relating to this?

A. Yes, sir.

Q. Will you look at page 18 of a book entitled "Records of general bills for collection 2, Pacific Coast Steamship Company," and see whether upon that page you find another entry relative to the charge against Moore, Ferguson & Co. in this matter?

A. Yes, sir; I find such an entry.

Mr. Towle. We offer this entry in evidence.

Mr. Treadwell. I object to it as incompetent. They seek to show that they have charged us in their books what they are suing us for now. It is their declaration merely.

Mr. Towle. Counsel asked the other day if we had any such entry. We now offer it.

Mr. Treadwell. I asked if they had on their books any occasion on which such a charge had been made, and he said he would look at the books and see.

The Court. I do not remember what your demand was. Its only materiality would be to show that it was the same character of charge made in the other case.

Mr. Treadwell. We do not care anything about it, because it does not amount to anything when it goes in.

The Court. I will let it go in then. It does not add to their evidence.

Mr. Towle. We will read the entry: "General bills of collection for the month of November;" the year is not stated.

Mr. Treadwell. It is evidently 1894.

Mr. Towle. 1894. "Date of billing, November 5th, 1894. No. 8. Against whom. Moore, Ferguson & Co. For what, freight on barley. Amount of bill, \$251.15. To whom rendered, M. F. & Co. Date. November 13th. Approved voucher. Amount, \$251.15."

Q. Have you with you the paper which formed the basis of that entry? A. Yes, sir (Handing).

Q. Is this it which you produce?

A. Yes, sir.

Mr. Towle. I offer this paper in evidence.

Mr. Treadwell. Objected as irrelevant, immaterial and incompetent. This is their own paper, made up by themselves with which we have nothing to do. I do not think the record ought to be filled up with these things.

The Court. The objection is sustained.

Mr. Towle. I do know that the Court knows what it is yet. It is a part of the transaction, and is directly connected with the telegram. If the telegram was admissible as evidence this directly refers to it, and it seems to me this also ought to be, because it shows what action was taken on this telegram.

The Court. This is a different matter from the books.

Mr. Towle. This is a report substantially, if the Court will look at it without it being offered in evidence.

Mr. Treadwell. Our objection is, it is transaction between themselves and not connected with us. It is their declaration.

The Court. I do not think it is admissible. I do not understand that it is, on any rule of evidence that I am familiar with.

Mr. Towle. Mr. Cooper, is it or not customary in stating the rates of freight on the manifest to mention there specifically the back charges?

Mr. Treadwell. Objected to as incompetent and irrelevant. The custom of these parties cannot bind the respondents.

The Court. No, but here is the point. You have called for the books, and he produced the books in which there are these charges. They are to be compared with the charge in this case. I do not know but what they are entitled now to explain, those books being in, whether or not those entries or charges are customary or not.

Mr. Treadwell. If that is all the question means, we have no objection to it. I did not understand the question that way.

Mr. Towle. My question is, in making their charges for freight on the manifest, whether or not it is customary to specify separately advance charges, or whether it is all put in as a freight charge?

A. Do you mean from Blanco?

Q. Yes. Blanco, or anywhere? Where there are advance charges for transportation, before it comes into the possession of the Pacific Coast Steamship Company, and they forward it, do they render a bill for the whole amount, including the transportation, or do they specify separately the advance charges?

A. They specify separately the advance charges when they have been advanced at the time, and paid over when

it is not a through rate—been actually advanced and paid over at the time.

Q. Where it had not been, then what?

A. Where it has not been paid over from Blanco it is customry to make the bill showing the rate right from the original point of shipment to the destination.

Q. It is made on the manifest on the shipment from Blanco, for instance, to ultimate destination?

A. Yes, sir.

Q. And not from Moss Landing?

A. Either from Blanco via Moss Landing, or to Moss Landing from Blanco.

Q. So that the manifest in a shipment of that character would not show the extent of the charge from Blanco, for instance, to Moss Landing? A. No, sir.

Q. It would all go in as the freight rate from Blanco to San Diego? A. Yes, sir.

Q. The adjustment as between the Steamship Company and the Railroad Company would come afterwards?

A. Yes, sir.

Cross-Examination.

Mr. Treadwell.—Q. Mr. Cooper, referring to the manifest of cargo, steamship “Bonita,” September 20th, 1894, referred to by you, do you know who wrote that paper?

A. Do you mean the manifest itself?

Q. The paper itself, just as it is here; as you have produced it?

A. Mr. Carroll, the purser of the steamer.

Q. Where was that written, if you know?

A. Probably between Moss Landing and the point of destination.

Q. When and how did that reach your office in San Francisco?

A. Turned into our office by the purser on his return to port, San Francisco.

Q. Is the whole of that page, and the whole of the entry read, in Mr. Carroll's handwriting?

A. No, sir.

Q. What portion of it is not in Mr. Carroll's handwriting?

A. The blue pencil notation memorandum.

Q. That is not in Mr. Carroll's handwriting?

A. No, sir.

Q. The blue pencil is as follows: "PV. R. R., 58,720, at \$1, equals \$29.36." Then there is one below there which appears not to refer to that item? Who wrote that blue pencil memorandum?

A. That was written by a clerk in our office, at the time.

Q. Do you know when?

A. When he was making the division of that rate subsequent to the return of the manifest to the office, prior to the settlement with the railroad company.

Q. That, then, simply a memorandum of a subsequent settlement with the railroad company, and is not a part of the original manifest?

A. The notations were not there when the manifest was returned to our office by the purser.

Q. Do you know anything of that item yourself, beyond what you see on this book?

A. I know that item is correct, that it was paid.

Q. Did you ever see those potatoes? A. Never.

Q. Do you know that they were shipped, except from this manifest?

A. I am referring to the blue pencil memorandum.

Q. I do not refer to that. I am referring to the item itself, on the 271 sacks of potatoes. Do you know anything about the shipment yourself?

A. I know nothing about it. I never saw the shipment.

Q. You do not know, in fact, there ever was such a shipment, do you, except from this manifest?

A. Except for that record and the receipt of our agent for the potatoes at San Diego.

Q. I simply mean, you personally know nothing about it?

A. No, sir.

Q. Do you know in any way how those potatoes were shipped?

A. Will you define that question?

Q. When they were shipped from Blanco, do you know where they were consigned to?

A. I have that record to go by.

Q. From that record you infer that they were shipped to where from Blanco?

A. They were shipped by the Railroad Company to Moss Landing

Q. From that record?

A. Yes, sir.

Q. Please show what there is on the record to imply that?

A. From Blanco ex Pajaro Valley Railroad.

Q. You know as a fact that the railroad does not come any further than Moss Landing, but do you know where those goods were consigned to from Blanco?

A. I presume to Moss Landing. I think they were

consigned right to San Diego, there being no storage on the shipment.

Q. Have you the same to say with regard to the blue pencil memorandum on the other manifest?

A. Yes, sir.

Q. There is nothing on the original manifest to show what the railroad freight in any case is, on this manifest of the steamer "Bonita," of November 2nd, 1894?

A. Nothing to show to the uninitiated.

Q. Is there anything in the manifest itself to show what the railroad freight is? A. There is to me, yes.

Q. What is it?

A. The fact that the rate is \$4.35.

Q. How does that indicate it?

A. I know what are local charge is.

Q. I do not ask you that. From this manifest alone can you determine that?

A. I know the division of the rate.

Q. I do not ask you what you know outside. Is there anything on that manifest which shows what the railroad freight is?

A. It does not state specifically there, except with the blue pencil memorandum. Leaving that aside, it does not state specifically the railroad company's proposition.

Q. In these two cases, consignments to Nason & Co. of various sacks of spuds, and to H. C. Treat & Co. of some sacks of wheat, in both of these cases they purport to have been shipped from Moss Landing, do they not, to San Diego?

A. In one case from Morocojo, and in the other case from Salinas.

Q. Does not that manifest show that they were shipped from Moss Landing to San Diego?

A. One line reads from Moss Landing to San Diego, and the one below from Morocojo ex Pajaro Railroad.

Q. That is not to San Diego? It does not say to San Diego?

A. It might be considered part of the same item, Moss Landing ex Morocojo to San Diego. That is practically what it means.

Q. In either of these cases do you know anything about those shipments personally?

A. In what respect?

Q. Do you know anything about them personally?

A. I never saw the potatoes.

Q. Do you know they were, in fact, shipped except through this record?

A. Except from that record and our agent's receipt for them.

Q. Do you know from this record, or any other sources, whether in either case they were stored in the warehouse at Moss Landing?

A. I judge not from the fact that there is no provision with the exception of the first shipment.

Q. I am not referring to that, but to the other two.

A. I judge they were not stored there, as there is no provision for storage charged. The rate does not include storage.

Q. The first line of that manifest is the one in controversy in this suit, is it not? A. Yes, sir.

The Court.—Q. In blue pencil I find this memoran-

dum: "Look out for storage credit." What does that mean?

A. That means that 25c. of that is to be credited to Moss Landing storage.

Q. When was that memorandum made in blue pencil?

A. On the apportionment being made on the return of the statement prior to entering it in this book (pointing).

Q. What is the meaning of "S. D."?

A. San Diego.

Q. "1/8 of 4457?"

A. The proportion that we allow the San Diego wharf for wharfage. Our rate includes wharfage.

Q. You own the wharf? A. Yes, sir.

Q. There is a heading here on the manifest, printed in the body, "Advance charges". What is that for? What do you enter in that blank?

A. We enter where the purser actually pays our advance charges to a connecting line.

Q. Where the purser pays?

A. Yes, sir; where it is actually paid over.

Q. Where it is not actually paid over, it is not entered in that? A. No, sir.

Mr. Treadwell. Your honor referred to a pencil memorandum, which you read. On which item was that memorandum?

The Court. The one involved in this case.

Redirect Examination.

Mr. Towle. Q. The custom, so far as these manifests,

is that on the return of the steamer they are turned in to the office? A. Yes, sir.

Q. In the ordinary routine of the office, they are taken up, and the apportionment made? A. Yes, sir.

Q. These pencil memoranda are a part of that apportionment? A. Yes, sir.

Q. It is done in the ordinary routine work of the office? A. Yes, sir.

Q. You heard the testimony of Mr. Cook with reference to your agreeing to accept 85c. in full of all transportation and warehouse charges on this grain, and the surplus of freight 85c. in excess of \$2.50? You heard his testimony on that? A. Yes, sir.

Q. Did you ever agree to that proposition?

Mr. Treadwell. I object to the question, as that calls for a conclusion. The witness can state what occurred.

Mr. Towle. I have a right to ask whether he agreed to any such proposition.

The Court. I think the better way is to ask what he said. Did he make any statement about the 60c. and the 25c.?

A. No, sir. I never heard any such statement to my knowledge.

Q. You heard what he said about that?

A. Yes, sir.

Q. Is it true or false?

A. It is absolutely false, Mr. Cook's testimony, for the most part.

Mr. Towle.—Q. Did you, or not, ever agree to accept a specific sum from Moore, Ferguson & Co., in excess of the \$2.20?

Mr. Treadwell. I object to the question as calling for a conclusion. Let him state what he did or said.

The Court. It seems to me to be open to that objection.

Mr. Towle.—Q. Supposing that Mr. Cook did make the statement, which you say he did, that they would pay 85c. in addition to the \$2.50, did you reply to that that would be satisfactory to you, or anything of that character?

A. No, sir.

The Court.—Q. Did you, by your silence, give consent?

A. No, sir. I do not remember any such statement or any such proposition on the part of Mr. Cook—any specified amount mentioned.

Mr. Towle.—Q. When was the last conversation with him, as near as you remember?

A. November 6th.

Q. Was that the day that the telegram was sent?

A. Yes, sir?

Q. Was he there at the time that telegram was written?

A. Yes, sir.

Q. Was it submitted to him? A. It was.

Q. And satisfactory to him? A. It was.

Q. You heard the testimony of Mr. Ferguson with reference to you agreeing to give that special rate by telephone. Have you any recollection of doing such a thing as that?

A. My recollection is, in my conversation with Mr. Ferguson I said I thought there would be no objection to our delivering the grain at \$2.50, and collecting the balance of charges here from him—from his company here. The final arrangements were made with Mr. Cook.

Q. Had any final arrangement been reached by telephone with Mr. Ferguson?

Mr. Treadwell. Objected to as calling for a conclusion.

Mr. Towle.—Q. Did you understand that any final arrangement had been reached with Mr. Ferguson by telephone?

Mr. Treadwell. Objected to as calling for a conclusion, and as not being in rebuttal.

The Court.—Q. You are calling for the conclusion of the transaction?

Mr. Towle. Yes, sir.

The Court. That is a fact. He is not calling for the agreement, but for the time the last part of the transaction was concluded.

Mr. Treadwell. I beg Your Honor's pardon. The question was "on a particular occasion, did you understand that was the final conclusion of the whole thing?" I think that is improper, and calls for his understanding.

Mr. Towle. I have a right to his understanding. He is one of the parties.

The Court. I overrule the objection.

Mr. Towle.—Q. Did you understand that any final arrangement had been reached with Mr. Ferguson by telephone?

A. Not as to the proposition that we were to deliver the barley at less than the ordinary rate.

Q. Now, Mr. Cooper, when, in your mind, was the question of the delivery of this grain at \$2.50 at San Diego, finally and definitely settled? At what date?

Mr. Treadwell. Objected to as immaterial. Let him state the facts.

The Court. I think that was what he was calling for. That is the way I should construe it, anyhow.

A. November 6th.

Mr. Towle.—Q. That is the date when the telegram was sent? A. Yes, sir.

The Court.—Q. This had been shipped on November 2nd. A. Yes, sir.

Mr. Towle.—Q. Do you remember of any discussion relating to the warehouse receipt and what was shown upon that by Mr. Cook? You heard him testify with reference to that?

A. My recollection of that is that Mr. Cook brought the warehouse receipt to our office and handed it over to me, and I simply took it and took it in the inner office, and the letter was written to our agent on the same date, October 27th, enclosing that receipt.

Q. Do you recollect any discussion between Mr. Cook and yourself with reference to what appeared on that warehouse receipt as charges against this grain?

A. Yes, sir.

Q. You heard him testify that that matter was discussed?

A. I remember him saying something about there being a 25c. storage charge.

Q. Do you remember anything as to the discussion relative to other charges as stated by Mr. Cook?

A. Do you mean with reference to the possible railroad charges? Q. Yes.

Q. Had any final arrangement been reached by telephone with Mr. Ferguson?

Mr. Treadwell. Objected to as calling for a conclusion.

Mr. Towle.—Q. Did you understand that any final arrangement had been reached with Mr. Ferguson by telephone?

Mr. Treadwell. Objected to as calling for a conclusion, and as not being in rebuttal.

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Mr. Towle. Yes, sir.

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Q. Do you recollect any discussion between Mr. Cook and yourself with reference to what appeared on that warehouse receipt as charges against this grain?

A. Yes, sir.

Q. You heard him testify that that matter was discussed?

A. I remember him saying something about there being a 25c. storage charge.

Q. Do you remember anything as to the discussion relative to other charges as stated by Mr. Cook?

A. Do you mean with reference to the possible railroad charges? Q. Yes.

A. I remember stating that possibility to him on two occasions, very explicitly and definitely.

Q. Did you, in any conversation, recede from that?

A. No, sir. As to my answer about November 6th, perhaps I might explain that somewhat. I stated that November 6th was when I definitely understood it to be settled that the barley was to be delivered at \$2.50. On November 3d, in the afternoon, I told Mr. Cook that if he would telephone us the number of sacks, and so forth, the data, on the following Monday morning, I would arrange to have such a telegram sent. It might have been considered settled at that time. Mr. Cook came down on the following Tuesday morning, and we re-opened the question; so November 6th was the date on which it was finally and definitely settled.

Q. Although on the Saturday previous to that you had agreed if he would come down on Monday you would fix up a telegram and send it?

A. Yes, sir; if he could give me a record of the number of sacks, that I could express the telegram intelligently, and we would explain it. He came down, and the question was re-opened.

The Court.—Q. You wrote a letter on October 27th?

A. Yes, sir.

Q. The warehouse receipt was delivered to you, and the letter was written by you, transmitting that receipt to your agent at Moss Landing, on October 27th?

A. Yes, sir.

Mr. Treadwell.—Q. To whom was that letter sent?

A. To our agent at Moss Landing.

Q. Will you examine and see if that is not the letter, or a copy of it? (Handing a letter to witness.)

A. No, sir; that is not the letter. That is a letter of a later date, referring to the warehouse receipt.

The Court.—Q. What is the date of that letter?

A. October 31st. Shall I read it?

The Court. Not unless it is called for.

Mr. Treadwell.—Q. That is a letter that was sent by you, is it?

A. I did not notice the signature. The signature is somewhat indistinct, but I think it is Mr. Edward Goodall's signature.

Mr. Treadwell. It appears to be. We will read this as part of the cross-examination.

“ OCT 31st, 1894.

“ Mr. S. N. LAUGHLIN, Castroville, Calif.:

“Dear Sir:—The other day we sent you a Warehouse Receipt, No. 1023, for 2448 sacks of barley, “ Marked ‘ 96,’ delivered to us by Moore, Ferguson & “ Co. of this city, the same to be shipped to San Diego “ by the Bonita next Friday morning. When you make “ this shipment please forward to Messrs. Moore, Ferguson & Co. of this city the company's regular shipping “ receipt to cover, and oblige

“ Yours truly,

“ GOODALL, PERKINS & CO.”

(Marked “ Respondents' Exhibit 3.”)

Mr. Towle. I have no further testimony.

Testimony closed.

[Endorsed]: Filed September 10th, 1895. Southard Hoffman, by J. S. Manley, Deputy Clerk.

*In the District Court of the United States, in and for the
Northern District of California.*

PACIFIC COAST STEAMSHIP COM-
PANY,

Libelant,

vs.

E. W. FERGUSON, ELIDA F. HOB-
SON and JOHN COOK, partners,
doing business under the firm
name of MOORE, FERGUSON &
Co.,

Respondents.

No. 11,167.

IN ADMIRALTY.

Opinion.

Libel in personam to recover a balance of freight.
Libel dismissed for want of jurisdiction.

GEO. W. TOWLE, JR., Esq., proctor for libelant.
W. B. TREADWELL, Esq., appearing for MASTICK, BEL-
CHER & MASTICK, proctor for respondents.

MORROW, DISTRICT JUDGE.

A libel in personam was filed in this case to recover a balance of freight alleged to be due for the transportation of 2,448 sacks of barley, weighing 271,510 pounds, on one of libelant's steamers, from Moss Landing to San Diego, both ports being within the State of California. The libel alleges that the rate of freights agreed upon was \$4.35 per ton of 2,000 lbs., of which sum \$2.50 per ton was to be paid by the Howard Commercial Co., of San Diego, the consignee of the barley; the balance of \$1.85, including a charge of 25c. per ton for storage in libelant's warehouse at Moss Landing while awaiting transportation, was to be paid by Moore, Fer-

guson & Co., the shippers. It is further averred that the Howard Commercial Co., paid upon delivery of the barley, their agreed portion of the freight, viz.: \$2.50 per ton, but that the respondents, Moore, Ferguson & Co., have refused at all times to pay the balance claimed to be owing, viz.: \$1.85 per ton, aggregating the sum of \$251.15, the amount sued for. The respondents, in their answer, confessed judgment to the amount of \$115.39 being the amount of 85c. per ton, and deposited said sum in the registry of the Court, leaving a balance of \$135.76 or \$1.00 per ton, as the amount still in dispute.

The evidence in the case disclosed the fact that this charge of \$1.00 per ton was the amount of the advance freight paid by the Pacific Coast Steamship Co. to the Pajarro Valley Railroad Co., for the transportation of the barley by rail from a place called Blanco in the interior of the State to Moss Landing on the coast, for shipment by vessel. This railroad part of the transportation was clearly not maritime and the contract, with respect thereto, not within the Admiralty jurisdiction. A contract, claim of service, to be cognizable in the admiralty, must be maritime in such a sense that it concerns rights and duties appertaining to commerce or navigation.

The Belfast, 7 Wall., 624, 637.

The service rendered must be maritime in its nature.

The Hendrick Hudson, 3 Ben., 419; Fed. Cas., 6355.

A Raft of Cypress Logs, 1 Flip., 543; Fed. Case, 11,527.

Gurney v. Crockett, Abb. Adm., 490; Fed. Cas., 5874.

The John T. Moore, 3 Woods, 68; Fed. Cas., 7430.

The Murphy Tugs, 28 Fed. R., 429.

The Pulaski, 33 Fed. R., 383.

Whatever jurisdiction the Court may have had over the libel originally, by reason of the fact that the alleged contract related to transportation by water, that jurisdiction, manifestly, no longer exists, as the entire claim for freight on account of that service has been satisfied by the respondents, tendering in to the Court the balance remaining due for that part of the service. The arrangements made by the Pacific Coast S. S. Co., with the railroad company, whereby the railroad charges were included in the whole freight charges as a lump sum, must obviously be treated as immaterial so far as the jurisdiction of this Court is concerned. As a matter of law, the Pacific Coast Steamship Company only became responsible as a carrier, when the sacks of barley were delivered to it for shipment on board its steamer. As was said in the *Richard Winslow*, 67 Fed. R., 259: "It is the general rule of law, respecting carriers of goods, that their liability as carriers terminates with the service of transportation, after a reasonable time and opportunity for the consignee to accept and remove them; and that for any storage thereafter, or any storage previous to, and while awaiting orders of the shipper for forwarding, the liability is that of warehousemen only. Pars. Con. c. 11, Sec. 9; 2 Am. & Eng. Ency. Law., 878, and note; *Peoria, etc., Ry. Co. v. United States Rolling Stock Co.*, (111) Sup., 27 N. E., 59. This rule applies to carriage

by water. Carv. Carr. by Sea, Sec. 472. As defined in *Kohn v. Packard*, 3 La., 224, the contract of affreightment by water is one 'to carry from port to port, and the owners of a vessel fulfill the duties imposed on them by delivering the merchandise at the usual place of discharge.' ” The averments of the libel itself show that Moore, Ferguson & Co., were only obligated to pay for transportation from Moss Landing to San Diego, and nothing is said about railroad charges from Blanco, the place in the interior from which the barley was originally shipped. If the question in controversy were as to whether the respondents agreed to pay \$4.35 or \$3.35 per ton for the transportation from Moss Landing to San Diego—a difference simply as to the amount agreed upon—there would be no doubt as to the jurisdiction of this Court, and it would be incumbent upon it to proceed to a final decision upon the facts. But when the testimony discloses that the only point in dispute is as to whether or not the respondents agreed to pay the libellant for the railroad transportation from Blanco to Moss Landing, which, the testimony shows, the latter advanced it presents a question which the Court has no constitutional power to entertain or pass upon.

Let a judgment be entered in accordance with this opinion.

[Endorsed]: Filed November 5th, 1895. Southard Hoffman, Clerk, by J. S. Manley, Deputy Clerk.

At a stated term of the District Court of the United States of America, for the Northern District of Cali-

ifornia, held at the courtroom, in the City of San Francisco, on Tuesday the 5th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable WM. W. MORROW, Judge.

PACIFIC COAST STEAMSHIP COMPANY	} No. 11, 167.
vs.	
E. W. FERGUSON ET AL.	

Order for Decree.

This cause having been heretofore submitted to the Court for consideration and decision, now after due consideration had thereon, the Court renders its written opinion, and it is by the Court ordered that a decree in conformity therewith be duly drawn and entered.

In the District Court of the United States, for the Northern District of California.

PACIFIC COAST STEAMSHIP Co.,	}
Libelant,	
vs.	
EBEN W. FERGUSON ET AL.,	}
Respondents.	

Petition for Re-hearing.

So long time has elapsed since this case was tried and argued, and matters of so much importance have since occupied your Honor's attention, that it would not be surprising if what seems to be, should be, the fact, that is: that the position, contended for by plaintiff, has been lost sight of.

Upon the general proposition, announced by the Court, that it has no jurisdiction to entertain suits to recover for storage, or for land transportation, we agree with the Court, and so stated at the argument.

But as it seems to us, that question of jurisdiction is in no way connected with the determination of the question of the balance due upon a marine contract of affreightment—which is the only question in this case—even though it should be necessary, in determining that amount, to determine, collaterally, whether or not a certain arrangement, relating to such marine affreightment, and other matters, had been entered into on land.

The single question here presented, for determination, by the libel, was the amount of the balance due, as freight, upon a water carriage.

The defence is, payment of all but a sum stated, and deposited in Court to the order of libelant.

The proof, to sustain the allegations to the libel, is that a sum in excess of the sum due for water carriage was agreed to be paid by defendants; that part payment of the whole sum was made; that of such partial payment libelant had appropriated—as it is authorized to do by section 1479 of the Civil Code of California—so much as was necessary in discharge of that portion of defendant's contract which related to land transportation, and the residue in partial discharge of their obligation upon the contract for water transportation.

Now, under these conditions, what is the question to be determined—that alleged by the libel—and to sustain which proof was offered? Or is it the collateral matter of fact upon the determination of which, if you please,

the final contention of the parties may turn? But how turn? It appears that certain moneys have been received by libelant, from defendants, and that a portion of such moneys has been applied in discharge of an obligation, of defendants, for land transportation. If libelant was authorized to make such application of such moneys then the sum claimed is due—otherwise not. May not this Court, incidentally, determine that fact, as a means of reaching a conclusion upon the question in issue? Can there be any doubt that it can.

Of course it often happens that the Court must, incidentally, pass upon many matters, the genuineness of a writing, for instance, offered as evidence and in proof of some fact tending to show the real right of the controversy—but if such were the case, in an admiralty proceeding, would this Court refuse to pass upon the question of the genuineness of that paper, because, forsooth, it should appear that it was one relating to the *building* of the ship—such contracts not being the basis for a suit in admiralty if the suit was *to recover the balance due on such contract*. Suppose the suit was instituted to determine the ownership of the vessel, could this Court not consider the contract for the building of the vessel as *evidence* bearing upon that question—would it be precluded from doing so because it had not jurisdiction over the subject matter of such contract? Clearly not.

If not in such a case, then why substantially that in this case, where the only bearing that the question relating to land transportation and storage can have, under the allegations of the libel and the proofs of the libelant—and such, if sufficient to raise an issue as to their truth, must

be sufficient to give this Court jurisdiction to determine their truth or their falsity—is, by its consideration and determination to enable the Court to say whether there is the balance due to libelant upon its contract for marine carriage, which is alleged to be due in this libel. Libelant has not asked of this Court, and does not now ask, any judgment that anything is due it for land carriage or for storage. As to such matters they are, so far as libelant is concerned, past and settled transactions—settled, when the moneys received from the Howard Commercial Company were applied by libelant in liquidation of them. This being so, they are eliminated from the matters to be adjudged—although necessary for the Court to determine as collateral facts—before it can render its judgment upon the issues made by the libel.

Another consideration: The libel is sufficient to give this Court jurisdiction, the answer concedes a balance of freight money as due to libelant for marine carriage. This being so, how is the jurisdiction of this Court ousted? Surely the tender and payment into court of a lesser sum than libelant claims cannot have that effect—no more in this case than in the other. But that the balance due is the only issue tendered or made by libelant.

What results? Simply this, that if the Court cannot consider anything relating to land carriage—has not jurisdiction to do so—then as all that matter is matter of defense; it has not jurisdiction of the matter of defense. Of course this cannot be so, for any matter of defense may be considered, and any collateral matter having a bearing as well, if the Court has jurisdiction to determine the single, final, issue which is to be determined by its

judgment—in this case a balance alleged to be due for marine transportation.

Again, it is well settled that jurisdiction must be determined from an inspection of the complaint—that is the Court's charter. A denial of the facts alleged cannot oust jurisdiction; if that were so the road of the defendants were an easy one. The determination of some jurisdictional fact by the Court may result when it shall have been done in depriving it of *further* jurisdiction in the proceeding, but that result can never be reached so long as there is a single issue remaining within the jurisdiction of the Court to determine, and that question *is* in this case, is alleged in the libel, is denied in part only by the answer.

What we desire is a determination of the ultimate fact in this case. We are disinclined generally to ask for rehearings by trial courts, preferring, as the more orderly course, the remedy by appeal; but in this case such a proceeding is out of the question.

We, therefore, most urgently request that this matter be reconsidered, and argument thereof again had, before the conclusion announced in the opinion of the Court, now on file, shall become final by judgment entered thereon.

Dated this 7th day of November, 1895.

GEO. W. TOWLE, JR.,

Proctor for Libellant.

[Endorsed]: Filed November 7th, 1895. Southard Hoffman, Clerk.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom, in the City of San Francisco, on Tuesday, the 12th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable WM. W. MORROW, Judge.

PACIFIC COAST STEAMSHIP COM-
PANY

vs.

EBEN W. FERGUSON ET AL.

No. 11,167.

Order Granting Petition on Re-hearing.

In this case the petition for a rehearing herein this day came on for hearing and said petition was duly argued by Geo. W. Towle, Jr., Esq., in support thereof, and by Wm. B. Treadwell, Esq., proctor for respondents and submitted. And after due consideration had thereon, it is by the Court ordered that a rehearing herein be and the same is hereby granted. And thereupon the cause was reargued by Geo. W. Towle, Jr., Esq., on behalf of the libelant and by Wm. B. Treadwell, Esq., proctor for the respondents, and submitted to the Court for consideration and decision.

*In the District Court of the United States, in and for the
Northern District of California.*

PACIFIC COAST STEAMSHIP Co.,

Libelant.

vs.

MOORE, FERGUSON & Co.,

Respondents.

No. 11,167.

IN ADMIRALTY.

**Opinion on Re-hearing Rendered Jan. 11th,
1896.**

This was a libel by the Pacific Coast Steamship Company against E. W. Ferguson, Elida F. Hobson and John Cook, partners doing business under the firm name of Moore, Ferguson & Co., to recover a balance of freight alleged to be due.

GEO. W. TOWLE, JR., for libelant. W. B. TREADWELL appearing for MASTICK, BELCHER & MASTICK, proctors for respondents.

MORROW, DISTRICT JUDGE.

A libel in persona was filed in this case to recover a balance of freight alleged to be due for the transportation of 2,448 sacks of barley, weighing 271,510 pounds, on one of libelant's steamers, from Moss Landing to San Diego, both ports being within the State of California. The libel alleges that the rate of freight agreed upon was \$4.35 per ton of 2,000 pounds, of which sum \$2.50 per ton was to be paid by the Howard Commercial Company, of San Diego, the consignee of the barley. The balance of 1.85, including a charge of 25 cents per ton for storage in libelant's warehouse at Moss Landing, while awaiting transportation, was to be paid by Moore, Ferguson & Co., the shippers. It is averred that the Howard Commercial Company paid, upon delivery of the barley, their agreed portion of the freight, viz.: \$2.50 per ton, but that the respondents, Moore, Ferguson & Co., have refused at all times to pay the balance claimed to be owing, viz.: \$1.85 per ton, aggregating the sum of \$251.15—the amount sued for. The respondents, in their answer, admit that

they agreed to pay libelant the sum of \$3.10 per ton of 2,000 pounds as freight for the transportation of the barley from Moss Landing to San Diego, and that they would also pay to the libelant such storage charges on the barley as had theretofore accrued at the warehouse of the libelant at Moss Landing, which charges, they are informed and believe, were twenty-five cents per ton; they admit the payment of \$2.50 per ton by the Howard Commercial Company. Pursuant to these admissions, the respondents allege that they had made a tender of the sum of \$115.39, being the balance due the libelant in full satisfaction and payment of its demand, and this sum the respondents accordingly deposited in the registry of the Court for the libelant. This last sum added to the \$2.50 per ton paid by the Howard Commercial Company makes the sum of \$3.35 per ton, which the respondents claim was the freight charge agreed upon between the parties for the transportation of the barley from Moss Landing to San Diego, including the storage charge of 25 cents per ton. This leaves a charge of \$1.00 per ton as the amount in controversy.

The evidence in the case shows that the rate of freight agreed upon for the transportation of the barley from Moss Landing to San Diego was \$3.10 per ton, as alleged in the answer; that the warehouse receipt for the storage of the barley at Moss Landing contained a charge of 25 cents per ton, which Moore, Ferguson & Co. agreed to pay; that there was also an additional charge of \$1.00 per ton, being the amount of the advance freight paid by the Pacific Coast Steamship Company to the Pajaro Valley Railroad Company for the transportation of the barley

by rail from a place called Blanco, in the interior of the State, to Moss Landing, on the coast, for shipment by vessel. Whether Moore, Ferguson & Co. agreed to pay this last charge the evidence is conflicting, but in the view I take of the evidence it is not necessary to determine this question.

G. H. Cooper, an employe of the Pacific Coast Steamship Co., who represented the company in the negotiations for the transportation of the barley, was called by the libelant, and testified that he informed the respondents that their rate from Moss Landing to San Diego was \$3.10 per ton, and that there would probably be charges on the grain from some point on the narrow gauge railroad to Moss Landing. H. M. Goodall, also called for libelant, corroborates this statement. If such conversation relative to these back charges were had, it does not appear that the rate or amount thereof was fixed upon, or even referred to, until after the shipment on board of the steamer. It is denied by the witnesses for the respondents that anything was said about back charges for railroad transportation until after the grain had been actually shipped and was in the warehouse of the company at Moss Landing, or that the respondents agreed to do anything more than pay a difference of 85 cents per ton, the Howard Commercial Company paying \$2.50 per ton, making a total charge, or rate, of \$3.35 per ton, instead of \$4.35, as is claimed by the libelant, which, of course, includes the \$1 per ton railroad charges.

Conceding, for the purposes of the case, that the fact is, as testified to by witnesses for libelant, viz.: that the respondents had agreed to pay for the railroad transpor-

tation, yet this part of the transportation was clearly not maritime, and the contract, with respect thereto, not within the Admiralty jurisdiction. A contract, claim or service, to be cognizable in the Admiralty, must be maritime, in such a sense that it concerns rights and duties appertaining to commerce or navigation. *The Belfast*, 7 Wall., 624, 637. The service rendered must be maritime in its nature. *The Hendrick Hudson*, 3 Ben., 419, Fed. Cas., No. 6, 335; *A Raft of Cypress Logs*, 1 Flip., 543, Fed. Cas., No. 11, 527; *Gurney v. Crockett*, Abb. Adm., 490, Fed. Cas., No. 5874; *The John T. Moore*, 3 Woods, 68, Fed. Cas., No. 7, 430; *The Murphy Tugs*, 28 Fed., 429; *The Pulaski*, 33 Fed., 383.

As a matter of law, the Pacific Coast Steamship Company only became responsible as a carrier when the sacks of barley were delivered to it for shipment on board its steamer. As was said in *The Richard Winslow*, 67 Fed., 259: "It is the general rule of law respecting carriers of goods, that their liability as carriers terminates with the service of transportation, after a reasonable time and opportunity for the consignee to accept and remove them, and that for any storage thereafter, or any storage previous to and while awaiting orders of the shipper for forwarding, the liability is that of a warehouseman only. Pars. Cont. c. 11, Sec. 9; 2 Am. & Eng. Enc. Law, 878, and note; *Peoria & P. U. Ry. Co. v. United States Rolling Stock Co.* (Ill. Sup.), 27 N. E., 59. This rule applies to carriage by water. Carv. Carr. by Sea, Sec. 472. As defined in *Kohn v. Packard*, 3 La., 224, the contract of affreightment by water is one 'to carry from port to port, and the owners of a vessel fulfill the duties imposed on

them by delivering the merchandise at the usual places of discharge.' ”

Whatever jurisdiction the Court may have had over the contract alleged in the libel, that jurisdiction does not extend to the controversy concerning the payment of the railroad charge of \$1.00 per ton from Blanco to Moss Landing. The Court is, therefore, not called upon to determine whether there was any agreement upon that subject or not. The arrangements made by the Pacific Coast Steamship Company with the railroad, whereby the railroad charges were to be included in the whole freight charge as a lump sum, must, obviously, be treated as immaterial. No arrangement of transportation charges or statement of account can give this Court jurisdiction over a controversy that it does not have by law. Nor does the law relating to the application of payments transfer the controversy to the maritime feature of this contract. The evidence shows that it was the intention of Moore, Ferguson & Co. to apply the payment of \$2.50 per ton made by the Howard Commercial Company, to the charge for water transportation from Moss Landing to San Diego, and the additional tender is specifically made to cover the balance of that charge and the amount due for storage at Moss Landing. How then can it be said that the balance claimed to be due is upon a maritime contract?

The libellant, having failed to prove that there was an agreement to pay more than \$3.10 per ton for the transportation of the barley from Moss Landing to San Diego, the decree must be for the libellant for the sum tendered in Court.

I do not decide whether Moore, Ferguson & Co. as-

sumed the railroad charges due on the barley for transportation from Blanco to Moss Landing, in order to secure the delivery of the grain at the usual rate at San Diego, as claimed by libelants, as I deem the question of land transportation not within my jurisdiction to determine.

[Endorsed]: Filed January 11, 1896. Southard Hoffman. By J. S. Manley, Deputy Clerk.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom, in the City of San Francisco, on Saturday the 11th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable WM. W. MORROW, Judge.

THE PACIFIC COAST STEAMSHIP
COMPANY

vs.

MOORE, FERGUSON & Co.

} No. 11,167.

Order for Decree on Second Hearing

This cause having been submitted to the Court for consideration and decision after a hearing hereof, now after due consideration had thereon, the Court renders its written opinion and by the Court ordered that the libelant recover the amount of tender and ordered that a decree in favor of libelant for the sum of \$115.39 be duly drawn and entered, and further ordered that respondents recover its costs.

At a stated term of the District Court of the United States of America, for the Northern District of Califor-

nia, held at the courtroom, in the City of San Francisco, on Friday the 17th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable W. W. MORROW, Judge.

PACIFIC COAST STEAMSHIP COM- PANY,	}	No. 11,167.
vs.		
E. FERGUSON ET AL.		

Order for Decree

On motion of Mr. Treadwell, proctor for respondents, a decree in favor of libelant for \$115.39, with costs in favor of respondents, was this day duly signed and entered.

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom in the Appraiser's building, in the city of San Francisco, on the 17th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Present: HON. W. W. MORROW, District Judge.

PACIFIC COAST STEAMSHIP COM- PANY (a Corporation),	}	No. 11,167.
Libelant,		
vs.		
EBEN W. FERGUSON, ELIDA F. HOBSON and JOHN COOK, Co- partners, and doing business un- der the firm name and style of MOORE, FERGUSON & Co.,	}	IN ADMIRALTY.
Respondents.		

Decree

This cause having been heard on the pleadings and proofs, and having been argued by the advocates for the respective parties, and due consideration being had in the premises, it is now ordered, adjudged and decreed by the Court that the libelant do have and recover the sum of one hundred and fifteen dollars and thirty-nine cents (\$115.39), being the sum tendered by the respondents and deposited in the registry of this Court, and that the libelant do pay to the respondents their costs to be taxed.

WM. W. MORROW, Judge.

[Endorsed]: Filed January 17th, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States for the Northern District of California.

PACIFIC COAST STEAMSHIP COMPANY,

Libelant,

vs.

EBEN W. FERGUSON, ELIDA F. HOBSON, and JOHN COOK, Co-partners, etc.,

Respondents.

No. 11,167.

IN ADMIRALTY.

Respondent's Bill of Costs

Clerk's fees paid by respondents.....	\$14 30
Marshal's fees paid by respondents.....	2 00
Commissioner's fees paid by respondents.....	3 50
Docket fee.....	20 00
	\$39 80

UNITED STATES OF AMERICA, }
 Northern District of California, } ss.

W. B. Treadwell, being duly sworn, deposes and says that he is one of the proctors for the respondents in the above entitled cause, and that the services charged in the foregoing bill of costs have been actually and necessarily performed as therein stated, and the payments therein charged have been actually and necessarily made.

W. B. TREADWELL.

Subscribed and sworn to before me this 17th day of January, 1896.

SOUTHARD HOFFMAN,

Comm'r U. S. Cirt. Ct. N. D. Cal.

Proctor's costs taxed at \$39.80.

SOUTHARD HOFFMAN, Clerk.

To Mr. Geo. W. Towle, Jr., proctor for the libelant above-named:

You will please take notice that on Monday, the 20th day of January, 1896, at the hour of ten o'clock A. M., at the office of the Clerk of said Court, the respondents will apply to the Clerk of said Court to tax their costs in the above-entitled cause.

MASTICK, BELCHER & MASTICK,

Proctors for Respondents.

Receipt of a copy of the within is hereby admitted this 17th day of January, 1896.

GEO. W. TOWLE,

Attorney for Libelant.

[Endorsed]: Filed January 17th, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

District Court of the United States, Northern District of California.

PACIFIC COAST S. S. CO.,	}	No. 11,167.
vs.		
E. W. FERGUSON, ET AL.		

BALANCE CLERK'S AND COMMISSIONER'S COSTS.

1895.

Aug. 19—Filing libs. not. setting cause	\$.20
28—Order hearing continued . . . . .	.30
29—Hearing .30, swearing 3 wit. lib. .60 . . .	.90
Filing lib. Exhibit "No. 1" . . . . .	.20
Swearing one wit. for resp. . . . .	.20
30—Further hearing .30, swearing 2 wits. for resp. . . . .	.70
Filing resp. Exhibits "A, B & C" . . . . .	.60
Sept. 10—Further hearing .30, Filg. testy. .20 . . .	.50
Nov. 5—Filing opinion 20 Order Judgt., ent. and decree, etc., .30 . . . . .	.50
7—Filing petition for rehearing. . . . .	.20
12—Order hearing on pet. . . . .	.30

1896.

Jan. 11—Filing opinion .20, Order lib. recover tender, etc., .30 . . . . .	.50
17—Order decree signed and entered . . . . .	.30
Filing decree .20, entering decree i fo.30	.50
Filing resp. bill of costs. . . . .	.20
Filing clerk's bill of costs . . . . .	.20
Filg. Commissioner's bill of costs . . . . .	.20
Making and filing judgment record	2.30
Dockets and Indices	4.00
Stipulation . . . . .	.20

\$13.00

COMMISSIONER'S COSTS.

1896.

Jan. 17—Oath to respdts. bill of costs50
\$13.50

Clerk's and Commissioner's costs taxed at \$13.50.

SOUTHARD HOFFMAN, Clerk.

[Endorsed:] Filed Jany. 17th, 1896. Southard Hoffman, Clerk.

*In the District Court of the United States, in and for the
Northern District of California.*

PACIFIC COAST STEAMSHIP COM-
PANY (a Corporation),

Libelant,

vs.

EBEN W. FERGUSON, ELIDA F.
HOBSON and JOHN COOK, Co-
partners, and doing business un-
der the firm name and style of
MOORE, FERGUSON & Co.,

Respondents.

No. 11,167.
IN ADMIRALTY.

Petition of Appeal

To the Honorable Circuit Court of Appeals for the Ninth Circuit:

The appeal of the Pacific Coast Steamship Company, a corporation, libelant, above-named, respectfully shows:

That on the 23rd day of May, 1895, the libelant above-named, filed herein its verified libel against respondents, in a cause of contract civil and maritime, in which it

prayed damages in the sum of \$251.15 together with interest and costs, upon an alleged breach of a contract for the maritime transportation and delivery of 2448 sacks of barley from Moss Landing, California, to San Diego, California.

That thereupon, and upon said 23rd day of May, 1895, monition was issued requiring respondents to appear and make answer to said libel.

That thereafter and on the ——— day of June, 1895, respondents appeared and filed in said Court their verified answer to said libel, in and by which said answer respondents denied that they had ever agreed to pay to libelant the sum of \$4.35 per ton as alleged in the said libel, and therein asserted an alleged agreement had with libelant different from, and inconsistent with, that alleged by libelant in the premises, and further alleged a tender of the sum of \$115.39, made by respondent to libelant, in satisfaction of its said demand, on the 16th day of November, 1894, and that the said sum was brought into Court and deposited in the registry thereof for libelant, in full satisfaction of its demand in the premises.

That thereafter, and on or about the 29th day of August, 1895, the trial of said cause upon the pleadings so made was commenced and the same continued from day to day until September 10, 1895, when the said cause was argued and finally submitted to said Court for its decision; that thereafter, and on November 7, 1895, said Court filed its opinion and decision, holding that it had not jurisdiction of the subject matter of said action and ordering that said libel be dismissed.

That thereafter and on the 9th day of November, 1895, libelant filed in said cause its petition for a rehearing thereof, and the same coming regularly on for hearing on the 12th day of November, 1895, was granted by said Court, and the said cause was thereupon, on last mentioned day, reargued and resubmitted to said Court for decision.

That thereafter and on the 11th day of January, 1896, said Court filed another opinion and decision in said cause, holding that the Court had not jurisdiction to determine the question at issue—presented by the libel and denial by the answer thereto—and directing judgment in favor of libelant for the sum of \$115.39—the said amount alleged as tendered and deposited in the registry of the Court—and that respondents recover their costs.

That thereafter, and on the 17th day of January, 1896, the decree herein was signed and filed, on motion of respondents, and entered in favor of libelant for \$115.39 and in favor of respondents for their costs, taxed at \$39.80.

That said decree is the final decree of said District Court in the premises.

That thereafter, on the — day of January, 1896, this appellant filed in said cause and served upon the proctor for respondents appellant's notice of appeal and assignment of errors, and obtained an order from said court and the Hon. W. W. Morrow, the Judge who tried and decided said action, permitting appellant to make this appeal.

That this appellant is advised and insists that said decision is erroneous, inasmuch as libelant was entitled to a decree for the sum demanded in its said libel, and for

interest and costs ; that the special contract alleged in said libel was proven; that the same was single and entire, and related wholly to the terms upon which the grain mentioned in said libel should be, and was, transported by water from Moss Landing to San Diego, and there delivered upon payment by the consignee of a part only of the sum agreed to be paid for such services, as provided by said special contract ; that the said contract was wholly maritime and within the admiralty jurisdiction of said District Court; that said Court refused to decide the matter in issue in this action, to wit: the existence or non-existence of the contract alleged in said libel, all to the prejudice of appellant.

And this appellant, for these and other reasons, set forth in its assignment of errors on file herein, appeals from the whole of said decree, and prays that this Court proceed and hear and examine the cause, and that the decree of said District Court may be vacated and an order be made directing said District Court to enter a proper decree in accordance with the final decision of this Court; and upon the hearing of said appeal, appellant will ask to make such amendments to its pleadings, and introduce such further evidence, as may appear necessary and just.

Dated San Francisco, January , 1896.

GEO. W. TOWLE, JR.,

Proctor for Libelant.

Service of the within Petition of Appeal and receipt of a copy admitted this 23rd day of January, 1896.

MASTICK, BELCHER & MASTICK,

Proctors for Respondents.

[Endorsed]: Filed Jany. 23rd, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

UNITED STATES OF AMERICA.

In the District Court of the United States for the Northern District of California.

PACIFIC COAST STEAMSHIP COMPANY, vs. EBEN W. FERGUSON, ET AL., Respondents.	Libelant, Respondents.	} No. 11,167.
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Order Allowing Appeal

On petition of George W. Towle, Jr., Esq., proctor for Pacific Coast Steamship Company, libelant in the above-entitled cause, it is ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree entered in the above-entitled action, on the 17th day of January, 1896, in said District Court be, and the same is hereby allowed.

Dated, San Francisco, January 23d, 1896.

WM. W. MORROW,

Judge.

[Endorsed]: Filed Jany. 23d, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

*In the District Court of the United States, in and for the
Northern District of California.*

PACIFIC COAST STEAMSHIP COM-
PANY (a Corporation),
Libelant,

vs.

EBEN W. FERGUSON, ELIDA F.
HOBSON, and JOHN COOK, co-
partners, and doing business un-
der the firm name and style of
MOORE, FERGUSON & Co.,
Respondents.

No. 11,167.
IN ADMIRALTY.

Notice of Appeal

To Eben W. Ferguson, Elida F. Hobson, and John Cook, copartners, and doing business under the firm name and style of Moore, Ferguson & Co., and to Messrs. Mastick, Belcher & Mastick, proctors for respondents.

Gentlemen: You, and each of you, will please take notice that libelant intends to, and hereby does appeal from the decree in the above-entitled cause to the Circuit Court of Appeals of the United States of America, for the Ninth Circuit.

Dated San Francisco, January 23d, 1896.

GEO. W. TOWLE, JR.,
Proctor for Libelant.

Service of the within Notice of Appeal and receipt of a copy admitted this 23d day of January, 1896.

MASTICK, BELCHER & MASTICK,
Proctors for Respondents.

[Endorsed]: Filed January 23d, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

PACIFIC COAST STEAMSHIP COMPANY (a Corporation),

Libelant,

vs.

EBEN W. FERGUSON, ELIDA F.

HOBSON and JOHN COOK, copartners, and doing business under the firm name and style of Moore, Ferguson & Co.,

Respondents.

No. 11,167.

IN ADMIRALTY.

Assignment of Errors

Now comes the Pacific Coast Steamship Company, a corporation, libelant herein, and assigns errors in the decision and decree herein as follows, to wit:

I.

The Court erred in its refusal to find, to pass upon or to determine the single issue made by the pleadings in this case; that is, the issue whether there was a special contract between libelant and respondent, by which contract it was, as alleged by libelant, agreed that as a consideration for the transportation and delivery of the grain referred to in the libel libelant should be paid the sum of \$4.35 per ton of 2,000 pounds, such sum to be paid to libelant as follows: \$2.50 per ton by the consignee upon

the delivery of the grain to him at San Diego, the balance of said sum of \$4.85—to wit, \$1.85 per ton—to be paid by the consignors (respondents) at San Francisco upon demand thereof made subsequent to such delivery at said San Diego.

II.

The Court erred in this, that it failed to find that respondents promised and agreed with libelant, that there should be paid to libelant the sum of \$4.85 per ton of 2,000 pounds, for each and every ton of the barley transported for respondents from Moss Landing to San Diego and there delivered to the consignee of the same; such sum of \$4.35 per ton to be paid as follows, that is \$2.50 per ton by the consignee upon delivery of the barley at San Diego, and \$1.85 per ton by the consignors—respondents—at San Francisco, upon demand therefor made subsequent to such delivery at said San Diego.

III.

The Court erred in awarding judgment for libelant in the sum of \$115.39 only, whereas the libelant is, and was, entitled to judgment for the sum of \$251.15, with interest and costs.

IV.

The Court erred in awarding judgment in favor of respondents for their costs.

V.

The Court erred in holding that the claim of libelant that respondents agreed to pay to libelant the charges for railroad transportation, on the barley, from Blanco to Moss Landing, in order to procure the transportation of the barley to and its delivery at San Diego, upon the payment there of \$2.50 per ton only, was without the jurisdiction of the Court to determine.

VI.

The Court erred in holding that the evidence shows that it was the intention of Moore, Ferguson & Co., to apply the \$2.50 per ton, paid by the Howard Commercial Company, to the charge for water transportation from Moss Landing to San Diego, as such charge is limited by the Court, that is: to the discharge of \$3.10 of the whole charge of \$4.35 per ton, for service.

January 23, 1896.

GEO. W. TOWLE, JR.,

Proctor for Libelant.

Service of the within assignment and receipt of a copy admitted this 23rd day of January, 1896.

MASTICK, BELCHER & MASTICK,

Proctors for Respondents.

[Endorsed]: Filed January 23rd, 1896. Southard Hoffmau, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

PACIFIC COAST STEAMSHIP COM-
PANY (a Corporation),

Libelant,

vs.

EBEN W. FERGUSON, ELIDA F.

HOBSON and JOHN COOK, co-
partners, and doing business
under the firm name and style
of MOORE, FERGUSON & Co.,

Respondents.

Stipulation Fixing Bond on Appeal

Stipulated and consented that the bond of libelant on appeal to the United States Circuit Court of Appeals in the above-entitled cause may be fixed at the sum of \$300, and that the same when filed shall be effective as a bond for costs on such appeal, and as a supersedeas bond as well.

MASTICK, BELCHER & MASTICK,

Proctors for Respondents.

[Endorsed:] Filed January 23, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

At a stated term of the District Court of the United States of America, for the Northern District of California, held at the courtroom, in the city of San Francisco, on Tuesday the 23d day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable WM. W. MORROW, Judge.

PACIFIC COAST STEAMSHIP CO., a
Corporation,

vs.

EBEN W. FERGUSON, ET AL.

No. 11,167.

Order of Court Fixing Amount of Bond on Appeal

In this cause, on motion of proctor for libelant, and pursuant to stipulation of proctors for respondents, on file here, it is ordered that the bond of libelant, on appeal, herein be, and the same hereby is fixed at the sum of \$300.

WM. W. MORROW, Judge.

[Endorsed]: Filed Jany. 23d, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

UNITED STATES OF AMERICA.

*District Court of the United States of America, Northern
District of California.*

PACIFIC COAST STEAMSHIP COMPANY

Libelant,

vs.

EBEN W. FERGUSON ET AL.,

Respondents.

Bond on Appeal

KNOW ALL MEN BY THESE PRESENTS:

That Pacific Coast Steamship Co., a corporation as principal, and Edwin Goodall and C. M. Goodall as sureties, are hereby held and firmly bound to the aforesaid respondents, their administrators, executors and assigns, in the sum of three hundred (\$300) dollars, United States gold coin, to be paid to the aforesaid respondents, their administrators, executors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Dated this 24th day of January, 1896.

Whereas, the above-named libelant had appealed to the Circuit Court of Appeals of the United States, Ninth Circuit, to reverse the decree in the above suit by the District Court of the United States for the Northern District of California.

Now, therefore, the conditions of this obligation are such that if the above-named appellant shall prosecute his appeal to effect, and answer all damages and costs, if he fails to make his appeal good, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

PACIFIC COAST STEAMSHIP CO.,
By GOODALL, PERKINS & Co.,
General Agents,
EDWIN GOODALL,
C. M. GOODALL.

UNITED STATES OF AMERICA, }
Northern District of California, } ss.

Edwin Goodall and C. M. Goodall, parties to the foregoing bond, being duly sworn, each deposes and says: That he is worth the sum of three hundred dollars, over and above his debts and liabilities.

EDWIN GOODALL,
C. M. GOODALL.

Subscribed and sworn to before me, this 24th day of January, 1896.

[SEAL.] JAMES L. KING,
Notary Public, in and for the City and County of San Francisco, State of California.

We are satisfied with the within bond and the sureties thereon.

MASTICK, BELCHER & MASTICK,
Proctors for Respds.

APPROVED: WM. M. MORROW,
Judge.

[Endorsed]: Filed Jany. 24th, 1896. Southard Hoffman, Clerk.

In the District Court of the United States for the Northern District of California.

PACIFIC COAST STEAMSHIP CO.,	}
Libelant,	
vs.	
EBEN W. FERGUSON ET AL.,	
Respondents.	}

Stipulation that Original Exhibits May be Used on Appeal and Order Thereon

Stipulated and consented that an order may be entered herein dispensing with the printing of the exhibits introduced herein in evidence by either party, and providing that originals of said exhibits may be used upon the appeal in the Circuit Court of Appeals of the United States of America for the Ninth Circuit.

Dated San Francisco, January 29, 1896.

GEO. W. TOWLE, JR.,

Proctor for Libelant.

MASTICK, BELCHER & MASTICK,

Proctors for Respondents.

Pursuant to the above stipulation it is hereby ordered that the exhibits referred to therein need not be printed as part of the record on appeal herein, and that the same shall be certified by the Clerk of this Court to the Clerk of the Appellate Court, and may be used upon the hearing of the appeal in the said Appellate Court.

Dated San Francisco, January 29, 1896.

WM. W. MORROW,

Judge.

[Endorsed]: Filed Jan'y 29th, 1896. Southard Hoffman, Clerk. By J. S. Manley, Deputy Clerk.

District Court of the United States, Northern District of California.

PACIFIC COAST S. S. Co.,

vs.

E. W. FERGUSON ET AL.

} No. 11,167.

Clerk's Costs on Appeal

1896.

Jan. 23..	Filing Petition on Appeal.....	\$0	20
23..	Filing Order Allowing Appeal.....		20
23..	Filing Notice of Appeal.....		20
23..	Filing Assignment of Errors.....		20
23..	Filing Stipulation Fixing Bond on Appeal		20
23..	Filing Order Fixing Bond on Appeal.....		20
23..	Filing Request to Prepare Transcript..		20
24..	Filing Citation on Appeal		20
24..	Filing Bond on Appeal		20
24..	Filing Approval of Bond.....		20
29..	Filing Stipulation that Original Exhibits May Be Used on Appeal.....		20
	To making Transcript on Appeal, 350 folios at 20 cents per folio.....	70	00
	Seal and certificate.....		70
			<hr/>
			\$72 90

Clerk's costs on appeal taxed at \$72.90.

SOUTHARD HOFFMAN, Clerk.

[Endorsed:] Filed January 29, 1896. Southard Hoffman, Clerk.

Certificate to Transcript

UNITED STATES OF AMERICA, }
 Northern District of California, } ss.

I, Southard Hoffman, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing and hereunto annexed one hundred and forty-five pages, number from (1) to (145) inclusive, contain a full, true and correct transcript of the record in said District Court in the cause entitled "Pacific Coast Steamship Company, a corporation, libelant, vs. Eben W. Ferguson, Elida F. Hobson and John Cook, copartners, and doing business under the firm name and style of Moore, Ferguson & Co., respondents." numbered 11,167, made up pursuant to rule 52 of the rules of the Supreme Court of the United States of America.

Witness my hand and seal of said District Court, at San Francisco, this 29th day of January, A. D. 1896.

[SEAL.] SOUTHARD HOFFMAN, Clerk.

[Endorsed]: No. 281. United States Circuit Court of Appeals for the Ninth Circuit. The Pacific Coast Steamship Company, Appellant, vs. Eben W. Ferguson, et al., Appellees. Transcript of Record. Appeal from the District Court of the United States for the Northern District of California.

Filed January 30, 1896.

F. D. MONCKTON,
 Clerk.